Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

CITY OF PARMA, OHIO,

Petitioner,

v.

CLEVELAND BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, and NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In a case seeking prospective injunctive relief, should a court's mootness analysis only consider the voluntary actions of the defendant since the case was filed, or should the court also determine whether the plaintiff has an ongoing interest in the litigation.

2. In a case seeking only prospective injunctive relief does a plaintiff-association that has chosen not to seek class certification "lose its standing" -- *i.e.*, does the case become moot -- if the plaintiff association cannot identify a member of the association who has maintained an ongoing interest in the litigation.

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The City of Parma, Ohio respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW AND JURISDICTION

The opinion of the Court of Appeals (App. at 3a-61a) is reported at 263 F.3d 513. The opinions of the District Court (App. at 62a-126a) are unreported. The Court of Appeals delivered its opinion, over dissent, on August 28, 2001, overturning the March 30, 1998 order of the District Court that granted the City of Parma's Motion for Summary Judgment. The Court of Appeals denied the City of Parma's Petition for Rehearing on October 29, 2001. (App. at 1a-2a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Under Article III of the United States Constitution "[t]he judicial power shall extend to all Cases . . . [and] Controversies."

STATEMENT

A. Overview

On August 6, 1990, the Cleveland Branch of the National Association for the Advancement of Colored People and the National Association for the Advancement of Colored People (collectively, the "NAACP") filed suit against the City of Parma ("Parma") on behalf of certain of its individual members. The jurisdiction of the District Court was invoked under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42

U.S.C. § 2000e *et seq.* and under 28 U.S.C. § 1331. The Complaint alleges Parma favored its own residents when hiring for municipal positions and, in so doing, discriminated on the basis of race. Based on these allegations, the NAACP sought declaratory and injunctive relief. The NAACP never sought class certification or money damages for any of the "members" on whose behalf it brought suit.

No court has reached the merits of the NAACP's allegations. Instead, both the District Court and the Sixth Circuit focused on Article III justiciability issues. Namely, they asked whether the NAACP had associational standing to bring this suit through the auspices of an Art Tomblin and five other individuals. And they asked whether the NAACP later "lost" its standing -- *i.e.*, whether the case became moot -- when these individuals ceased to be members of the NAACP and/or otherwise failed to maintain an interest in the prospective relief sought.[1]

For its part, the District Court held (1) the NAACP did not have standing because none of the "members" on whose behalf it brought suit had standing in their own right, and (2) the case was moot because: (a) Parma s laws and practices had "completely and irrevocably eradicated the effects of the challenged violation" and (b) "none of the identified 'members,' it would appear, would benefit from ... [the relief] the NAACP claims it wants from this Court." (App. at 91a, 94a n.18). It thus granted summary judgment in favor of Parma and dismissed the case. (App. at 62a-63a).

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[1] The Court of Appeals also discussed whether the case was ripe and whether the NAACP's charge to the Equal Employment Opportunity Commission limited the claims before the Court. (App. at 42a-48a).

Following denial of a Motion to Reconsider, the NAACP appealed. The Sixth Circuit reversed the District Court in a holding that rested on three propositions: (1) courts must analyze standing only once, at the start of the litigation, and plaintiffs thus do not have to maintain standing throughout the litigation; (2) the fact that the only individual who allowed the NAACP to achieve its initial standing, Art Tomblin, no longer had an interest in employment opportunities in Parma and was no longer a member of the NAACP did not divest either him or the NAACP of standing; and (3) these facts did not moot the case because litigation becomes moot "only" when the defendant can show it has voluntarily ceased to engage in the allegedly wrongful behavior -- without considering the conduct of the plaintiff.

B. The Majority Opinion in *NAACP v. Parma*[2]

In its opinion, the Sixth Circuit initially addressed the threshold question of when standing is to be determined. It stated that "jurisdiction is tested by the facts as they existed when the action was brought and that after vesting, it cannot be ousted by subsequent events." (App. at 22a (internal quotation marks, brackets, and citations omitted)). As such, it concluded, standing is to be determined as of the "time of the filing of the complaint only." (App. at 21a, 25a). "[S]tanding does not have to be maintained throughout all stages of litigation." (App. at 22a).

Pursuant to this holding, the majority analyzed the facts of the case as they existed at the commencement of the litigation and found that "the NAACP successfully obtained

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[2] The Opinion of Judge Moore was joined by District Court Judge Avery Cohn, sitting by designation. Judge Boggs dissented.

associational standing through Tomblin." (App. at 26a). When the complaint was filed a decade ago, the majority found, Tomblin was a member of the NAACP capable of showing a "concrete injury" because he had "more than 'some day intentions' of seeking and obtaining employment in Parma." (App. at 30a). His injuries were "fairly traceable to the challenged actions of Parma," and -- at the time the case was filed -- an injunction might have allowed him to obtain the sought-after position. (App. at 32a, 33a). Even if an injunction would not currently assist Tomblin, the court explained, it would be unjust to hold Tomblin's injuries were not redressible. (App. at 33a-35a).

The court then discussed whether the NAACP's claims were moot. Notably, while deciding that Tomblin -- and thus the NAACP -- had standing, the court acknowledged that "Tomblin does not express a present concrete interest in obtaining employment in Parma," and it further acknowledged he was no longer a member of the NAACP. (App. at 33a, 20a). That said, the court's holding indicates these facts did not moot the case. Although the Sixth Circuit conceded that both parties must have "a legally cognizable interest in the outcome" of the litigation, it translated this language narrowly as follows: "In other words, a case becomes moot only when subsequent events make it absolutely clear" that the defendant can no longer engage in the allegedly wrongful behavior. (App. at 36a).

When discussing mootness, the court thus looked solely at Parma's actions after the Complaint was filed, asking whether Parma had shown that its allegedly discriminatory hiring procedures "could . . . reasonably be expected to recur" and whether Parma had "prove[n] that interim relief or events had irrevocably eradicated the effects of the allegedly discriminatory conduct." (App. at 36a-37a, 40a). No

consideration was given to Tomblin's post-Complaint acts -- including his lack of interest in working for Parma and the fact that he had ceased to be a member of the NAACP.

C. Judge Boggs' Dissent

In his dissent, Judge Boggs disagreed with both the analysis and the conclusion set forth in the majority opinion. First, he maintained, the majority "appear[s] to conflate standing and mootness" by focusing solely on whether Tomblin and the NAACP had standing on the day the Complaint was filed and neglecting the question of whether their actions ultimately rendered the case moot. (App. at 50a). Although the majority recognized "that a plaintiff must continue to have a personal interest in ongoing litigation," he stated, "the court fails to . . . undertake the required analysis, seemingly concluding that once the NAACP met the requirements for associational standing through Tomblin, the NAACP's task in avoiding mootness was over." (App. at 52a). Among other things, Judge Boggs stated, the majority ignored the fact that "Tomblin admits that there was nothing else Parma could do to redress the injury he claimed to have suffered when he brought suit against Parma," and the fact that Tomblin stopped being an NAACP member. (App. at 58a, 56a). In doing so the court failed to abide by the Sixth Circuit's own binding precedent set forth in *City Communications, Inc. v. Detroit*, 888 F.2d 1081 (6th Cir. 1989). (App. at 53a-54a). It likewise failed to abide by this Court's binding precedent set forth most recently in *Friends of the Earth, Inc. v. Laidlaw Environmental Services*, 528 U.S. 167 (2000); *Spencer v. Kemna*, 523 U.S. 1 (1998); and *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997). Under that precedent, Judge Boggs concluded, the case was moot. (App. at 49a-50a).

REASONS FOR GRANTING THE PETITION

In *NAACP v. Parma*, the Sixth Circuit ruled that a case is not moot even when a plaintiff -- whether an individual or an association -- no longer has a legally cognizable interest in the litigation. To paraphrase the dissent, the majority concluded that once plaintiffs have established standing at the beginning of the litigation, their task in avoiding mootness is over. (App. at 52a).

Such a conclusion sets a dangerous precedent. Most notably, it runs counter to this Court's previous rulings -- all of which state clearly that a plaintiff's actions can render a case moot and that a case must be dismissed in the absence of a live controversy. Because this Court's discussions about standing and mootness rest on the United States Constitution, moreover, the Sixth Circuit's opinion improperly broadens the limited jurisdiction granted to the federal courts by the United States Constitution and invites both forum-shopping and a flood of essentially victimless lawsuits seeking relief benefiting no known, named individual. Effectively, this precedent invites associations and individuals to seek mere advisory opinions. Individual plaintiffs in the Sixth Circuit can now continue to litigate even when the court's decision will not redress their injury. Associations can now litigate "on behalf of" former members, who like a deceased member, have neither a discernible, present day interest in the alleged controversy nor any current affiliation with the organization itself.

Furthermore, the decision in *NAACP* reveals that this Court's intervention is warranted and its guidance is needed both inside and outside the Sixth Circuit. Looking within the Sixth Circuit, the decision highlights that court's misunderstanding about the differences between standing and

mootness, a misunderstanding foreshadowed in the dissent to *Friends of the Earth*. Looking outside the Sixth Circuit, the decision highlights the lower courts' uncertainty about how a case can become moot and about what should be considered in a mootness analysis.

For all of these reasons, this petition for certiorari should be granted.

A. Contrary to This Court's Prior Holdings, the Sixth Circuit Ruled That a Plaintiff Need Not Maintain a Cognizable Interest in Litigation Because "Only" A Defendant's Actions Can Moot a Case

In *NAACP*, the majority paid no more than lip service to the prior rulings of this Court regarding standing and mootness. Although it stated in passing that both parties must maintain a "cognizable interest in the outcome" of the litigation, (App. at 36a), it actually ruled that "only" a defendant's actions can moot a case and that a plaintiff need not maintain a legally cognizable interest in the litigation. Because such a ruling cannot be reconciled with this Court's binding precedent, the majority's opinion must not be allowed to stand.

1. The Majority Opinion

In *NAACP*, the majority began its jurisdictional analysis by determining that standing is measured at the time the litigation is filed. It then highlighted the facts as they stood when the case commenced and found that Tomblin (and the NAACP) met all three requirements -- injury, cause, and redressibility. (App. at 26a).

Having found that Tomblin successfully established standing for the NAACP, the court properly turned to a mootness analysis. However, that analysis was fundamentally flawed. Rather than both analyzing Parma's actions since the case was filed and asking whether Tomblin and the NAACP had a continuing interest in the litigation, the court focused solely on Parma. Rather than asking whether Tomblin could be helped by the sought-after injunction, the court asked only whether Parma could establish that "the recruitment, selection, and hiring practices challenged in this lawsuit are not likely to recur in the future" and only whether "events had irrevocably eradicated the effects of the allegedly discriminatory conduct." (App. at 38a-40a). In focusing on Parma, it ignored Tomblin altogether.

The Sixth Circuit ignored Tomblin despite the fact that his own subsequent actions had rendered the case moot. As the majority itself acknowledged, "Tomblin does not [in 2001] express a present concrete interest in obtaining employment in Parma," (App. at 33a), and he is no longer threatened with an actual injury. Because the NAACP seeks only prospective relief, moreover, neither the court nor Parma could redress any previous injuries Tomblin might have suffered. Judge Boggs put it succinctly:

> Tomblin admits that there was nothing else Parma could do to redress the injury he claimed to have suffered when he brought suit against Parma. Moreover, Tomblin seeks only future injunctive relief, not damages for past injuries he has suffered. Since there is no future injunctive relief that this court can give to Tomblin to redress his injuries, his claim has become moot. . . . Any future injunctive relief that this court could grant Tomblin

> would not make a difference to him since he has stated that Parma has done all it could for him.

(App. at 58a (dissent)). In other words, the Sixth Circuit ignored the fact that the trial court is being asked to provide prospective injunctive relief to an individual who can no longer be aided by that relief.

In focusing its mootness inquiry solely on Parma, the majority did not merely reach an erroneous conclusion on the facts, and it did not simply misspeak. To the contrary, it erroneously maintained it was required to do so. Citing to *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979), the majority stated that "a case becomes moot *only* when subsequent events make it absolutely clear" that the defendant's allegedly wrongful behavior cannot recur and that subsequent events have "irrevocably eradicated the effects of the alleged violation." (App. at 36a (emphasis added)). Citing to *Ford Motor Company v. EEOC*, 457 U.S. 219, 221 (1982), the majority stated that "requiring a plaintiff to maintain a concrete interest" in the litigation would be unfair insofar as it "would unjustly compel a plaintiff . . . to assert a present, concrete interest in a position that he had applied for in the distant past." (App. at 34a). In the dissent's words, the majority apparently concluded that once a plaintiff shows he has standing, his "task in avoiding mootness [is] over." (App. at 52a).

2. The Conflict

Such a conclusion is in direct conflict with this Court's previous rulings both on mootness and on the limits of federal judicial power.

(a) The Majority's Conclusion Conflicts With This Court's Prior Rulings on Mootness.

This Court has long held that that "Article III of the Constitution limits the 'judicial power' of the United States to the resolution of 'cases' and 'controversies.'" *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982); *see also Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (stating that the federal courts have "neither the power to render advisory opinions nor 'to decide questions that cannot affect the rights of litigants in the case before them'"). Instead, a "live" controversy must exist at all stages of the proceedings. *See United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980).

Pursuant to the case-or-controversy requirement, all plaintiffs -- whether an individual such as Tomblin or an organization such as the NAACP -- must have standing when a case is filed. *Arizonans*, 520 U.S. at 64, 67; *Warth v. Seldin*, 422 U.S. 490, 511 (1975). They must, moreover, maintain the elements of standing throughout the litigation. In other words, the case cannot continue if it becomes moot. As the *Spencer* Court explained, the "case-or-controversy requirement subsists through all stages of federal judicial proceedings . . . . This means that, throughout the litigation, the plaintiff must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Spencer*, 523 U.S. at 7 (internal quotation marks and citations omitted); *see also Arizonans*, 520 U.S. at 67, 68 n.22 (holding a case was moot because the plaintiff "lacked a still vital claim for prospective relief" and describing mootness "as the doctrine of standing set in a time frame: The requisite personal

interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness)." (internal quotation marks omitted)); *City News & Novelty, Inc. v. City of Waukesha*, 121 S. Ct. 743, 747 & n.1 (2001) (holding a case became moot when the plaintiff lost "a legally cognizable interest in the outcome" of the case, thereby "sapping the controversy of vitality").

According to the majority opinion in *NAACP*, however, "only" defendants can moot a case, and plaintiffs must merely show the elements of standing -- injury, causation and redressibility -- once, when the litigation is first filed. Such a ruling conflicts with this Court's prior holdings on mootness, invites organizations to seek advisory opinion, and improperly compels trial judges to decide issues even though no individual who ever had standing to sue has maintained a "legally cognizable" interest in the resolution of the complaint. Such a decision warrants review.

(b) <u>The Majority's Conclusion Conflicts With This Court's Prior Rulings on the Scope of Federal Court Jurisdiction</u>.

The Sixth Circuit's opinion conflicts not only with this Court's long-established mootness doctrine, but also with its equally long-standing rulings regarding the limits of federal judicial power.

As stated above, the doctrines of standing and mootness are jurisdictional, arising out of the case-or-controversy requirement set forth in Article III to the Constitution.

> Article III of the Constitution limits federal "judicial power," that is, federal-court jurisdiction, to "Cases" and "Controversies." This case-or-controversy limitation serves "two complementary" purposes. It limits the business of federal courts to "questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process," and it defines the "role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government."

Geraghty, 445 U.S. at 395-96 (internal citations omitted). In other words, the doctrines are "threshold issues" to be decided before the court turns to the merits of the case. "The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'" *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998) (quoting *Mansfield, Coldwater & Lake Mich. Rwy. Co. v. Swan*, 111 U.S. 379, 382 (1884)).

In *NAACP*, however, the Sixth Circuit neglected this fundamental principle. That is, it decided Tomblin's injuries were redressible not by analyzing whether an injunction could rectify any harm he may have suffered, but by asking whether it would be fair to dismiss the case due to delays in its resolution. In the majority's words,

> [t]he fact that Tomblin does not express a present concrete interest in obtaining employment in Parma does not divest him, and

> consequently the NAACP, of standing. As the Supreme Court has previously recognized, Title VII litigation often involves lengthy delays, and "[t]he extended time it frequently takes to obtain satisfaction in the courts may force a discrimination claimant to suffer through years of underemployment or unemployment" before any resolution occurs. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 221, 73 L. Ed. 2d 721, 102 S. Ct. 3057 (1982). To allow employers to negate a plaintiff's standing by strategically delaying resolution of an employment discrimination case until the plaintiff is no longer interested in obtaining the position would place any plaintiff, including those seeking only injunctive relief, in an impossible dilemma. . . . Therefore, requiring a plaintiff to maintain a concrete interest in the sought-after employment throughout all stages of the litigation would effectively force that plaintiff to choose between finding new employment to feed and shelter himself and his family and foregoing other employment to maintain his standing to sue.

(App. at 33a-34a). In so stating, the Sixth Circuit acknowledged that Tomblin no longer had an interest in the litigation and that an injunction would, for him, hold no relevance. It nonetheless ruled that his prior injuries were redressible because it would be unfair to rule otherwise.[3]

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[3] As the dissent notes, procedural mechanisms exist to alleviate these fairness concerns, yet the NAACP chose not to avail itself of such protections. (App. at 59a n.4).

This fairness analysis has no place in a determination whether a federal court has authority to hear and decide a case. When deciding questions of justiciability, the question is not whether that court *should* render an opinion, but whether, pursuant to the Constitution, it *can*. "Article III . . . is not merely a troublesome hurdle to be overcome if possible so as to reach the 'merits' of a lawsuit which a party desires to have adjudicated; it is a part of the basic charter promulgated by the Framers of the Constitution." *Valley Forge*, 454 U.S. at 476.

For all of these reasons, this Court must intervene and overturn the decision in *NAACP*.

B. Contrary to This Court's Prior Holdings, the Sixth Circuit Ruled that A Case is Not Moot If An Association Can No Longer Point to a Member With An Ongoing Interest in the Litigation.

This case is, in large part, about the limits of associational standing -- about whether and how an association can litigate on behalf of itself and its members. However, the Sixth Circuit failed to require the NAACP to identify a member who had an ongoing interest in the litigation and who could benefit if the NAACP received the prospective relief it sought. This failure places the Sixth Circuit in direct conflict with this Court's prior rulings, and it opens the door to a flood of litigation by the myriad of current -- and likely future -- associations formed in the name of every imaginable special interest.

In its opinion, more specifically, the majority recognized that the NAACP's ability to litigate its claims against Parma is inextricably intertwined with the ability of its members to litigate their own, individual claims against

Parma. Unless the NAACP could identify individual members of the organization with standing to sue in their own right, the NAACP would not have standing to sue "on their behalf." (App. at 21a (citing *Friends of the Earth*, 528 U.S. at 181); *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)).

However, the majority failed to recognize that the link between the NAACP and its individual members must remain throughout the litigation. Instead, it ruled that the link must exist only for a single moment in time -- the moment the complaint is filed. (App. at 22a). The majority therefore ignored the fact that the only individual who created the NAACP's standing no longer cares to work for Parma, admits that Parma did all it could to entertain his interest when it existed, and has no stake in any injunctive relief a court might grant. The majority likewise ignored the fact that the NAACP has chosen not to file a class action, that it seeks purely prospective injunctive relief, and that it is litigating solely on behalf of its members. Finally, it ignored the fact that Tomblin ceased to be a member of the NAACP five years ago, permanently severing whatever link once existed between him, the NAACP, and this litigation.

In failing to recognize that the link between an association and its members must remain throughout the litigation, the Sixth Circuit also ignored the fact that "[t]he possibility of such representational standing . . . does not eliminate or attenuate the constitutional requirement of a case or controversy." *Warth*, 422 U.S. at 511; *see also Hunt*, 432 U.S. at 343. To the contrary, the association must show "that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action." *Warth*, 422 U.S. at 511. This requirement is designed "to weed out plaintiffs who try to bring cases which could not

otherwise be brought, by manufacturing allegations of standing that lack any real foundation." *New York State Club Ass'n, Inc. v. City of New York*, 487 U.S. 1, 9 (1988).

An organization's standing rests so firmly on its members' standing because the organization acts "solely" as its members' representative. *See Warth*, 422 U.S. at 511. As this Court has made clear, "the doctrine of organizational standing recognizes that the primary reason people join an organization is . . . to create an effective vehicle for vindicating interests that they share with others." *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. Brock*, 477 U.S. 274, 290 (1986). The organization is thus "but the medium through which *its individual members* seek to make more effective the expression of their own views." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 459 (1958) (emphasis added); *see also Hunt*, 432 U.S. at 345 (stating an organization "provides the means by which [its members] express their collective views and protect their collective interests").

Therefore, just as an organization cannot gain standing if one of its members cannot gain standing, the organization must "lose standing" if the member on whose behalf it is litigating "loses standing." In other words, if a case is moot as to the named member, the case must become moot as to the organization. Otherwise, the organization is, by definition, either pursuing its own interests or litigating on behalf of people without a "legally cognizable interest in the outcome." *Geraghty*, 445 U.S. at 396. As the NAACP does not claim to have established its ability to litigate this case on its own behalf, it must be improperly asking the court to issue an advisory opinion with no effect on any identifiable individual member. Neither delays in the litigation nor the nature of the

claims an organization may have brought "justify a departure from the fundamental requirement that a plaintiff must have a continuing interest in the ongoing litigation in order for this court to exercise the limited jurisdiction it is granted by the Constitution." (App. at 60a (dissent)).

Nothing justifies, moreover, a departure from the Constitutional limits on third-party standing. As the District Court recognized, this Court has imposed a "general prohibition on a litigant's raising another person's legal rights." *Allen v. Wright*, 468 U.S. 737, 751 (1984); *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) ("'[A] mere interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to [confer standing.]"). As such, "erstwhile membership is not enough." (App. at 112a). To hold otherwise and to allow organizations to litigate "claims on behalf of individuals who may once have been but are no longer members, or are only members fleetingly during the litigation, would be to allow an end-run around the bar against third-party standing. At the risk of mixing a metaphor, the exception would swallow the rule." (App. at 113a).

For this reason alone -- *i.e.*, the fact that *NAACP* conflicts with this Court's prior rulings on mootness and third-party standing -- the Sixth Circuit's decision must be reviewed and, ultimately, overturned. However, the opinion also opens the door to the very litigation this Court has soundly rejected.

> Article III . . . reflects a due regard for the autonomy of those persons likely to be most directly affected by a judicial order. The federal courts have abjured appeals to their

> authority which would convert the judicial process into "no more than a vehicle for the vindication of the value interests of concerned bystanders." . . .[T]he 'cases and controversies' language of Art. III forecloses the conversion of courts of the United States into judicial versions of college debating forums.

Valley Forge, 454 U.S. at 473 (internal citation omitted); *see also Spencer*, 523 U.S. at 7. With the Sixth Circuit's precedent behind them, organizations will be freed to pursue litigation seeking vindication of their group's "value interest of the day," simply by drafting a pleading sufficient to achieve associational standing at the moment the case is initially filed. Thereafter, even if the individual "member" through whom standing was achieved dies, or drops out of the organization and disavows a concrete interest in the litigation's result, the case is free to proceed. This ruling invites organizations to improperly "manufactur[e] allegations of standing that lack any real foundation," *New York State Club Ass'n*, 487 U.S. at 9, and it allows them to skirt both the safeguards of a class action and the jurisdictional requirements of standing and mootness.

Contrary to this Court's instructions, associations can now litigate "on behalf of" individuals with no interest in the litigation and with so little interest in the association suing "on their behalf" that they have dropped their membership. This Court must therefore intervene.

C. The Holding in *NAACP* Invites This Court to Provide Some Much-Needed Guidance to the Lower Courts Over the Differences Between Standing and Mootness.

As the dissent in *NAACP* recognized, the majority failed to undertake the required analysis with respect to Tomblin and the NAACP because it had "conflate[d] standing and mootness." (App. at 50a). It did so because it compared standing not with mootness in general, but with mootness based only on voluntary cessation -- an erroneous comparison Justice Scalia warned the lower courts might make in his dissent to *Friends of the Earth*.

In *Friends of the Earth*, the majority acknowledged the ease with which standing can be conflated with mootness and, in an effort to alleviate any future confusion, underscored the differences between the two doctrines. 528 U.S. at 189. In his dissent, however, Justice Scalia expressed concern over the majority's discussion, particularly the way in which it characterized the differences between standing and mootness. On one level, he was "troubled by the Court's too-hasty retreat from our characterization of mootness as the doctrine of standing set in a time frame." *Id.* at 212. On another level, he suggested the majority's opinion could lead to "confusion" over precisely what must be shown before a case is declared moot.

> Part of the confusion in the Court's discussion is engendered by the fact that it compares standing, on the one hand, with mootness *based on voluntary cessation* on the other. The required showing that it is "absolutely clear" that the conduct "could not reasonably be expected to recur" is *not* the threshold

> showing required for mootness, but the ***heightened*** showing required in a particular category of cases where we have sensibly concluded that there is reason to be skeptical that cessation of violation means cessation of live controversy. For claims of mootness based on changes in circumstances other than voluntary cessation, the showing we have required is less taxing, and the inquiry is indeed properly characterized as one of "'standing set in a time frame.'"

Id. at 214 (Scalia, J., dissenting) (internal citations omitted; final emphasis added). In other words, Justice Scalia was concerned that lower courts might lose sight of the fact that "the requisite personal interest that must exist at the commencement of the litigation must continue throughout its existence." *Id.* (internal citations, quotation marks, and ellipses omitted).

The majority in *NAACP* did precisely what Justice Scalia warned a court might do. That is, it relied too heavily on the distinctions set forth in dicta in the majority's analysis in *Friends of the Earth*.

> The Supreme Court . . . proceeded to explain how mootness is distinct from standing, noting that the "[s]tanding doctrine functions to ensure, among other things, that the scarce resources of the federal courts are devoted to those disputes in which parties have a concrete stake" while "by the time mootness is an issue, the case has been brought and litigated often (as here) for years."

(App. at 23a-24a (internal citations omitted)). The Sixth Circuit then acknowledged that "mootness addresses whether [the] plaintiff continues to have an interest in the outcome of the litigation." (App. at 24a). But, as discussed more fully above, it proceeded to ignore the plaintiff's interest altogether. Instead, it concentrated solely on Parma's actions, asking only whether Parma had met its "heavy burden of demonstrating mootness." (App. at 36a).

The majority in *NAACP* has given this Court the opportunity to offer the lower courts much-needed guidance on standing, mootness, which party carries the burden of proof in a mootness analysis, how heavy that burden is, and if, at least in certain circumstances, mootness resembles "standing set in a time frame." Simultaneously, this Court can eliminate the confusion Justice Scalia warned of in *Friends of the Earth*. Without assistance, lower courts are likely to repeat the mistake the *NAACP* court made -- *i.e.*, to conflate standing and mootness by holding that a mootness analysis is only concerned with the defendant's conduct, that the burden in a mootness analysis is always the defendant's, and that such burden is always a heavy one.

D. *NAACP* Provides This Court With an Opportunity to Clarify a Debate Among the Circuits About When Standing Should Be Measured and the Relationship Between Standing and Mootness.

The Sixth Circuit's discussion about when standing should be measured references an ongoing debate among the circuits about the proper definition of the word "standing." For some circuits, standing is a threshold consideration which is measured once and only once -- at the time the complaint is filed. *See Becker v. FEC*, 230 F.3d 381, 386 n.3. (1st Cir. 2000); *White v. Lee*, 227 F.3d 1214, 1243 (9th Cir. 2000);

2000); *White v. Lee*, 227 F.3d 1214, 1243 (9th Cir. 2000); *Carr v. Alta Verde Indus., Inc.*, 931 F.2d 1055, 1061 (5th Cir. 1991). Subsequent events can never cause a plaintiff to "lose standing," they maintain, just as subsequent events can never cause a plaintiff to "lose" diversity jurisdiction. "Subject matter jurisdiction depends on the state of things at the time the action is brought; if it existed when the suit was brought, subsequent events cannot oust the court of jurisdiction." *Becker*, 230 F.3d at 386 n.3 (quoting *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 69 (1987) (Scalia, J., concurring)).

Other circuits hold plaintiffs "lose standing" if they can no longer show they have a redressible injury. *See Landmark Land Co., Inc. v. FDIC*, 256 F.3d 1365, 1380 (Fed. Cir. 2001); *Ruocchio v. United Transp. Union, Local 60*, 181 F.3d 376, 385 n.11 (3d Cir. 1999) (quoting *Artway v. Attorney General*, 81 F.3d 1235, 1246 (3d Cir. 1996)); *Powder River Basin Res. Council v. Babbitt*, 54 F.3d 1477, 1485 (10th Cir. 1995). For these courts, "the plaintiff must maintain a 'personal stake' in the outcome of the litigation throughout its course." *See Gollus v. Mendell*, 501 U.S. 115, 126 (1991). If a plaintiff is no longer injured, then "the Article III requirements of a case or controversy are no longer met," and the case must be dismissed. *Powder River*, 54 F.3d at 1485.

Neither stance necessarily conflicts with this Court's established precedent -- so long as the lower court recognizes that the plaintiff must continue to have a personal stake in the litigation. *See Arizonans*, 520 U.S. at 68 n.22. Courts in the first camp assess standing when the litigation is filed and then turn to a mootness analysis, asking whether the plaintiff has maintained a legally cognizable interest in the outcome of the case. *See, e.g., Becker*, 230 F.3d at 386 n.3 (stating that the

plaintiff's "interest is to be assessed under the rubric of standing at the commencement of the case, and under the rubric of mootness thereafter"). Courts in the second camp use the language of standing to apply a mootness analysis, effectively evaluating whether a plaintiff had a continuing interest in the ongoing litigation in order to prevent the litigation from becoming moot. *See, e.g., Karcher v. May,* 484 U.S. 72, 77-78 (1987); *Golden v. Zwickler,* 394 U.S. 103, 108 (1969).

In the Sixth Circuit's recent decision, however, the differences became more than semantic. In *NAACP*, the Sixth Circuit claims to have aligned itself with "the First, Fifth, Seventh, Eighth, and Ninth Circuits, which have all . . . held that standing is determined as of the time the complaint is filed." (App. at 25a n.11). It then distanced itself from both camps when it stated that "standing does not have to be maintained throughout all stages of litigation." (App. at 22a). However, the *NAACP* majority lost sight of the fact that plaintiffs must continue to show the *elements* of standing throughout the litigation. In other words, because the "case-or-controversy requirement subsists through all stages of federal judicial proceedings," plaintiffs must also be able to show that they are "threatened with . . . an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Spencer*, 523 U.S. at 7.

The Sixth Circuit has provided this Court with the opportunity to reconcile the ongoing debate among the circuits, to clarify when standing must be measured, and to explain the relationship between standing and mootness. This Court has recognized the ease with which the lower courts conflate standing and mootness. *See Friends of the Earth*, 528 U.S. at 189. And the lower courts have recognized it themselves. *See, e.g., Becker*, 230 F.3d at 386 n.3

(discussing the potential for confusion and stating that the *Powder River* court "conflate[d] questions of standing with questions of mootness"). The Sixth Circuit has revealed the danger inherent in this confusion. Within this circuit, plaintiffs who have standing when the case is filed have met the case-or-controversy requirement for the duration of the case -- no matter what the plaintiff does thereafter. Such a precedent warrants review and this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

99-3546

[Filed October 29, 2001]

National Association for the Advancement of Colored People, Cleveland, et al., *Plaintiffs-Appellants*,	)
v.	)
City of Parma, *Defendant-Appellee*.	)

JUDGES:

BEFORE: BOGGS and MOORE, Circuit Judges; and COHN,* District Judge

* Hon. Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Boggs would grant rehearing for the reasons stated in his dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 99-3546

[Filed, August 28, 2001]

Cleveland Branch, National Association for the Advancement of Colored People, and National Association for the Advancement of Colored People, *Plaintiffs-Appellants*,	)
v.	)
City of Parma, Ohio, *Defendant-Appellee*.	)

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland

No. 90-01404

Kathleen McDonald O'Malley, District Judge

JUDGES: Before: BOGGS and MOORE, Circuit Judges; COHN, Senior District Judge.*

COUNSEL

ARGUED: David L. Rose, ROSE & ROSE, Washington, D.C. for Appellants. Joseph J. Morford, ARTER & HADDEN, Cleveland, Ohio, for Appellee. **ON BRIEF**: David L. Rose, ROSE & ROSE, Washington, D.C., for Appellants. Joseph J. Morford, ARTER & HADDEN, Cleveland, Ohio, for Appellee.

MOORE, J., delivered the opinion of the court, in which COHN, D. J., joined. BOGGS, J., delivered a separate dissenting opinion.

OPINION

KAREN NELSON MOORE, Circuit Judge. On August 6, 1990, Plaintiffs-Appellants, the Cleveland Branch of the National Association for the Advancement of Colored People ("NAACP") and the NAACP (collectively referred to as "the NAACP"), filed this action against the City of Parma, Ohio ("Parma"), alleging that Parma discriminates on the basis of race in its recruitment, selection, and hiring of municipal employees. On March 30, 1998, nearly eight years later and after the lawsuit had been transferred twice within the United

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* The Honorable Avern Cohn, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

States District Court for the Northern District of Ohio,[1] the district court granted summary judgment in favor of Parma, holding both that the NAACP lacked standing to assert its claims and that its claims were moot. The NAACP now appeals the district court's decision. For the reasons that follow, we **REVERSE** the judgment of the district court and **REMAND** for further proceedings consistent with this opinion.

I. BACKGROUND

A. PARMA'S RACIAL HISTORY

Parma is a suburb of Cleveland, Ohio, located on the southern border of Cleveland near the center of the east-west axis of Cuyahoga County. In 1980, a federal district court judge found that Parma, a predominantly white city, had discriminated against Blacks in providing low and moderate income housing and issued a remedial order requiring Parma to take affirmative steps to eliminate its discriminatory housing practices and their effects. *See United States v. City of Parma*, 494 F. Supp. 1049 (N.D. Ohio 1980), *aff'd*, 661

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[1] This case was originally assigned to the late Judge Frank Battisti. After his death, the case was transferred in November of 1994 to Judge Robert Krupansky, who was then sitting as a district judge by designation. On April 18, 1996, Judge Kathleen O'Malley, the judge to whom this case had been transferred the previous month, entered an order to which the parties agreed. This order denied without prejudice as moot all pending motions, some of which had been pending for more than four years, and requested that the parties settle or renew any previous motions. In 1997, Parma and the NAACP filed renewed motions for summary judgment.

F.2d 562 (6th Cir. 1981), *cert. denied*, 456 U.S. 926, 72 L. Ed. 2d 441, 102 S. Ct. 1972 (1983); *see also United States v. City of Parma,* 504 F. Supp. 913 (N.D. Ohio 1980) (remedial order), *aff'd in part and rev'd in part*, 661 F.2d 562 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1983). Despite efforts by the city to diversify, however, the minority population of Parma has grown only slightly. Specifically, Parma's black population has remained very small. For example, in 1970, Blacks comprised approximately .05%, or 50 persons, out of Parma's 100,216 resident population, *see Parma,* 494 F. Supp. at 1056, and twenty years later, in 1990, Blacks still comprised less one percent of Parma's resident population, namely only 73%, or 639 persons, out of Parma's 87,876 resident population. U.S. CENSUS BUREAU, 1990 CENSUS OF POPULATION AND HOUSING (1990).[2]

Like the resident population of Parma, data suggest that the racial composition of Parma's municipal workforce

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[2] In 1990, Parma was 98% white, with 86,028 Whites, 957 Asians or Pacific Islanders, 639 Blacks, 85 American Indians, Eskimos, or Aleuts, and 167 persons belonging to other races, in its resident population. Excluding Blacks, the non-white population of Parma equaled approximately 1.3% of Parma's resident population. 1990 CENSUS, GENERAL POPULATION AND HOUSING CHARACTERISTICS: 1990. According to the 2000 Census, 95.7 % of Parma's resident population is white. The remainder of the population in Parma is as follows, Black or African-American, 1.1%; American Indian and Alaska Native, 0.1%; Asian, 1.6%; other races, 0.4%, and two or more races, 1.1%. U.S. CENSUS BUREAU, CENSUS 2000 REDISTRICTING DATA (2000). A separate calculation reflects that 1.5% of the year 2000 population is Hispanic or Latino. *Id.*

also lacks diversity. For example, despite the enactment in 1981 of a formal affirmative action program,[3] by 1988, Parma had only one black employee out of more than 460 full-time employees, a number equivalent to approximately .22% of the city's full-time workforce. Joint Appendix ("J.A.") at 780 (1991 Expert Report of Herbert Hammerman), 811 (1990 Ries Dep.). Six years later, in 1996, Parma employed only two black full-time employees out of 464 full-time employees and no black part-time employees out of 314 part-time employees, a number which represents approximately .26% of the city's entire municipal workforce.[4] J.A. at 936-936A. Apart from these two black full-time employees, only one

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[3] Parma's 1981 Affirmative Action Policy provides:

> "Affirmative Action" shall connote the City of Parma's positive and unequivocal commitment to such measures that it deems necessary to eradicate any or all vestigium of discriminatory employment practices that may have inhibited and contravened all minorities, women, the aged, and disabled from full and equal participation. . . .
>
> *It does require that vigorous action be taken to find ways to locate and attract qualified minorities, women, the aged and disabled and to include minorities, women, the aged and disabled in training programs so that their movement will be accelerated into those occupations and levles[sic] in which they are significantly underrepresented.*

Joint Appendix ("J.A.") at 942, 944 (emphasis added).

[4] For that fiscal year, Parma hired 32 new municipal employees, none of whom were black. J.A. at 936A.

other employee of Parma was non-white in 1996; that employee was listed as an Asian or Pacific Islander. J.A. at 936, 936A, 1310.

Parma's statistics regarding the employment of Blacks in municipal jobs stand in stark contrast to those regarding the employment of Blacks in the private sector of Parma and in the private and public sectors of the Cleveland metropolitan area.[5] According to an Equal Employment Opportunity ("EEO") report in 1994, Blacks constituted a significantly higher portion of the private workforce in Parma than in its municipal workforce, making up 9.5% or 2,224 of the 23,476 workers in private employment in Parma. J.A. at 956 (1997 Expert Report of Herbert Hammerman). Similarly, a 1995 report of the racial composition of the private workforce in the Cleveland metropolitan area showed that Blacks comprised 15.2% of the workers in that area's private sector. J.A. at 956 (1997 Expert Report of Herbert Hammerman). More importantly, state and local government employers in the Cleveland metropolitan area employed a workforce that was 31.5% black, nearly double that of the metropolitan area's private sector, more than triple that of Parma's private sector, and more than thirty-two times that of Parma's public sector. *See* J.A. at 957 (1997 Expert Report of Herbert Hammerman). In the opinion of the NAACP's expert, Herbert Hammerman, a labor market economist, this vast difference between the percentage of employees in the public

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[5] The Cleveland metropolitan area generally consists of Cuyahoga, Geauga, Lake, and Medina counties. This area "is considered by the federal government to be a realistic commuting area for geographic entities within which it is located." J.A. at 956 (1997 Expert Report of Herbert Hammerman).

and private sectors of Parma was unusual because "the employment of blacks by the state and local government public sector is [generally] substantially higher than private employment." J.A. at 956 (1997 Expert Report of Herbert Hammerman). According to Hammerman, "[t]he ratio of the percentage of blacks in public sector jobs [in 1994] to the percentage of blacks in private establishment jobs [was] 1.42," and "[a]pplying [that] national ratio, black employment available to Parma would be 13.5%." J.A. at 956 (1997 Expert Report of Herbert Hammerman). *See also NAACP v. Town of East Haven*, 892 F. Supp. 46, 50 (D. Conn. 1995) (noting that "Blacks generally have a higher representation in government than private industry").

Hammerman also explained that Parma's percentage of black municipal workers not only appeared low when compared to the percentage of black workers in the city's private sector or the public and private sectors of the Cleveland metropolitan area but also when viewed in light of the black workforce available to municipal employers in Parma, which Hammerman estimated to be about 19.7% of the available workforce. Using this estimate in an analysis of the racial composition of Parma's new municipal hires in 1996, Hammerman calculated between 2.9 and 7.5 standard deviations when he analyzed the statistical probability that random selection was responsible for the absence of Blacks from the group of new employees hired in fiscal year 1996, figures which indicated "very little probability that the failure

to hire any blacks was due to chance."[6] J.A. at 967 (1997 Expert Report of Herbert Hammerman).

B. PARMA'S HIRING REQUIREMENTS

Before 1988, Parma limited eligibility for municipal employment to "bona fide" residents of Parma, and employees of Parma were required to remain residents during their employment with Parma. J.A. at 308 (Ordinance 223-76). In 1988, however, Parma modified its residency requirement to permit a non-resident applicant to compete for a municipal position so long as that applicant established "permanent" residence in the city within eighteen months after starting employment. Those who were employees on the effective date were required to remain residents of Parma until the fifth anniversary of the commencement of their employment; thereafter, employees could reside in any municipality bordering Parma. J.A. at 192, 309, 311 (Ordinance 86-88).

In 1995, Parma once again amended its residency ordinance to allow non-resident applicants to obtain municipal jobs so long as they moved within fifteen miles of the outer boundary of Parma within eighteen months of becoming a municipal employee. J.A. at 311 (Ordinance 299-95). This

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[6] Using the more conservative estimate of 9.5%, which equals the percentage of black workers in Parma's private workforce, Hammerman calculated a disparity of 6.7 standard deviations between the expected and actual number of black employees in Parma's municipal workforce. J.A. at 957 (1997 Expert Report of Herbert Hammerman) (stating that this "indicates no meaningful probability that the event has occurred by chance").

fifteen-mile boundary incorporated virtually all of Cuyahoga County, which had a black population of 24.8%, or 350,185, of the county's 1,412,140 residents in 1990.[7] U.S. CENSUS BUREAU, 1990 CENSUS OF POPULATION AND HOUSING (1990). On June 3, 1996, Parma extended the boundary to twenty-two miles. J.A. at 313 (Ordinance 191-96).

Despite the changes that have been made to Parma's municipal job requirements, the record shows that Parma still continues to ask job applicants for information regarding their residency beyond their mailing address on its employment application. Specifically, Parma asks applicants to specify how many years and months they have lived in Parma if they are residents, whether they have relatives employed by the city, and what is the residence of any person recommending them for employment with Parma. J.A. at 1183 (Employment Application). Also, in September 1989, more than a year after repealing its official residency requirement, Parma hired three individuals, Greg Kohler, Vincent Semanik, and Robert Tarro, from an eligibility list that was created before Parma repealed its residency requirement, *see* Supplemental ("Supp.") J.A. at 58; J.A. at 978, 982, 984, and a few months thereafter, in April 1990, Parma hired three more individuals, Joseph Bobak, Daniel Heinz, and Orville Hildebrand, from an eligibility list that was created before Parma repealed its residency requirement, *see* Supp. J.A. at 58; J.A. at 974, 977.

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[7] The 2000 Census shows that the percentage of Blacks in Cuyahoga County had not changed since 1990, with Blacks comprising 24.7%, or 382,634 individuals, out of the county's 1,393,978 resident population. U.S. CENSUS BUREAU, CENSUS 2000 REDISTRICTING DATA (2000).

Additionally, based on the data presented to the district court, the vast majority of recent hires for Parma have been residents of the city. For example, of the twenty-eight applicants who secured employment with Parma in early 1997, twenty-five were residents of Parma, and eight of the twenty-eight had close relatives who were Parma employees. J.A. at 1380-1473. Furthermore, Parma has hired a substantial number of its full-time municipal employees from its pool of provisional, part-time, or temporary employees, many of whom were recommended by current employees of Parma. J.A. at 1188-1216, 1230-31. For example, out of thirteen full-time positions posted for new hires between November 20, 1995, and March 8, 1996, at least six were filled by former part-time employees, and two others were filled by transfer or promotion without any indication of a change from part-time to full-time. J.A. at 1165 (noting that Cheri Meadows was a part-time employee before she was transferred to a full-time position), 1188-1217.[8]

According to Parma, however, it has made efforts to recruit Blacks to its municipal workforce. Specifically, Parma claims that it has attempted to recruit Blacks by developing, distributing, and displaying posters and brochures directed at minorities at all three campuses of Cuyahoga Community College, Cleveland State University, Lorain Community College, and Lakeland Community College, *see* J.A. at 337, 409; Supp. J.A. at 144, 183; listing scheduled civil service examinations in the Cleveland *Plain Dealer*, the *Communicator* and the *Call & Post*, newspapers targeted to

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[8] A union contract required Parma to consider applications from employees within the bargaining unit before considering any other applications. J.A. at 1160-60A.

Cleveland's black community, and the *Sun* newspapers, *see* J.A. at 340-47, 358-60, 1069-78, 1302-09; Supp. J.A. at 142-43, 153-55 (1991 Ponstingle Dep.); and working with a consulting company to create a new test for hiring police officers and firefighters, *see* J.A. at 416.

C. NAACP'S ALLEGATIONS

The NAACP argues that the low percentage of Blacks in Parma's municipal workforce is not the result of chance, but of discriminatory practices used by Parma in its hiring process. Specifically, the NAACP maintains that Parma discriminates against Blacks in hiring:

> a. By failing or refusing to recruit and hire blacks on the same basis as whites;
>
> b. By following recruitment practices which advise residents of Parma, and friends and relatives of incumbent employees of Parma, of employment opportunities in the municipal employment of Parma without advising black persons in the relevant labor market of such opportunities;
>
> c. By following recruitment practices which have the effect of deterring non-residents, including almost all blacks, from applying for employment opportunities with Parma;
>
> d. By traditionally requiring that appointments be limited to residents of Parma, and by requiring that employees of defendant

establish and maintain their residence in Parma for forty-two months, a requirement that was intended to exclude and does disproportionately exclude blacks from municipal employment;

e. By failing and refusing to take the appropriate recruitment measures to correct the effects of the defendant's past discriminatory policies and practices;

f. By limiting hiring, until very recently, to lists of eligible[sic] created when appointments were limited to residents of Parma;

g. By using unvalidated selection procedures that have the effect of disproportionately excluding from employment those black applicants who do obtain timely information regarding employment opportunities and who are not deterred by the discriminatory practices of defendant.

J.A. at 230-31 (Second Amended Complaint).[9]

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[9] On September 27, 1991, Parma moved to dismiss the NAACP's claims, arguing that the NAACP lacked standing to sue and that the NAACP's claims were time-barred. On December 12, 1991, the district court entered an order requiring the NAACP to submit "'further particularized allegations of fact'" to support its standing. J.A. at 206 (citation omitted). In response, the NAACP filed an amendment to the complaint and then moved for a second

In making these allegations, the NAACP cited to seven different alleged victims of Parma's discriminatory practices. These individuals include: (1) Marlon Allen, who was interested in employment as a Parma firefighter but "did not hear of any opportunities to apply for the examination"; (2) Rodney Blanton, who applied for a police officer position with Parma but was "disqualified for 'background' reasons"; (3) Wendy Childress, who was interested in working for Parma as a firefighter but never saw any advertisements for municipal jobs in Parma and "would not take a job that required her to live in Parma"; (4) Rhonda Crayton, who wanted to obtain a job as a Parma police officer but failed the agility portion of the required police examination; (5) Maurice McIntosh, who visited Parma City Hall in February of 1990 and attempted to apply for a position with the city but "was informed that the City already had enough minorities, and was told that he would be notified if any openings in the positions he had identified came up"; (6) Artis Tomblin, who inquired about employment opportunities with Parma but was never contacted; and (7) Arthur Collins, who inquired about jobs for Parma in 1990 but "would not accept a job with

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amendment. This motion for leave to file a second amended complaint was among those denied as moot but without prejudice to its refiling in the district court's 1996 order. *See supra* n.1. Even though the NAACP later filed a renewed motion for summary judgment, it never renewed the earlier motion for leave to file a second amended complaint. However, because the parties' briefs and the district court's order address only the NAACP's second amended complaint, our review of this case is governed by the claims in the second amended complaint. *See, e.g., Gillis v. United States Dep't of Health and Human Servs.*, 759 F.2d 565, 570-71 (6th Cir. 1985).

Parma if he had to move there." J.A. at 232-34 (Second Amended Complaint).[10]

D. DISTRICT COURT'S ANALYSIS

1. Scope of EEOC Charge

In its decision on the NAACP's claims, the district court first identified the claims it deemed to be properly before the court. These claims included: (1) "the NAACP's claims regarding Parma's residency requirement in both its 1976 (to the extent and only to the extent eligibility lists continued to be constructed from applicants who sought employment prior to the 1988 change) and 1988 incarnations;" and (2) "the NAACP's claims regarding Parma's reliance on word-of-mouth and City Hall postings to recruit applicants for jobs." J.A. at 52.

The district court then held that the NAACP's challenge to Parma's police, firefighter, and other examinations were "not properly before [the] Court" because such "claim was neither expressly made in the EEOC charge, nor could it fairly be said to have 'grown out of' that charge." J.A. at 52. The district court reasoned that "[t]he EEOC charge read as a whole clearly focus[ed] on the residency requirement and other recruitment practices," and as a result,

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[10] The NAACP requested injunctive relief, enjoining Parma from continuing the alleged discriminatory practices, costs, attorneys' fees, expert witness fees, and "such additional relief as may be appropriate in the interests of justice." J.A. at 235-37 (Second Amended Complaint).

the charge "did not put the EEOC or Parma on notice that such a practice was being challenged, and did not allow a meaningful opportunity for the accomplishment of Title VII's mediation goals." J.A. at 52. The district court further reasoned that the EEOC charge was not entitled to any leniency because it was drafted by a representative of the NAACP and because later filings by the NAACP, including its complaint and amendments, failed specifically to identify a challenge to Parma's civil service examinations. J.A. at 53, 55.

2. Mootness

After identifying the claims in the case, the district court then held that they were moot because "Parma's elimination of the residency requirement [in 1988] and its affirmative -- and active -- efforts to recruit individuals, including minorities, outside of Parma, have given the NAACP what they sought to achieve by this action." J.A. at 58. The district court held that there was "no reasonable expectation that Parma [would] reenact the challenged ordinance or practices, and Parma's repeal of the residency requirement and other affirmative actions have eradicated the effects of what properly has been challenged in this case." J.A. at 58. In so holding, the district court noted that municipal employees of Parma were "free to live anywhere in Cuyahoga [C]ounty, and may even live in surrounding counties" and that Parma had taken other steps to improve its recruitment efforts by "advertis[ing] in three newspapers, one of which has a predominately black readership, regularly post[ing] job openings at several local colleges which have significant black student bodies (using brochures directed at recruiting blacks), . . . routinely mail[ing] postcards notifying

anyone who requests to be informed about upcoming civil service, police officer, and fire fighter examinations," and "volunteering to use whatever police officer examination the NAACP wants and representing that it would do the same for the fire fighter examination." J.A. at 57, 59. According to the district court, "[t]he status quo [in Parma] in 1998 . . . [did] not mirror the status quo twenty years earlier [because] [i]n the intervening years since the late 1970's and early 1980's, Parma's laws and practices have changed to such a degree that the NAACP is left complaining about what was wrong in the past, rather than what is wrong today." J.A. at 62.

3. Standing

Finally, the district court held that, even if the case were not moot, it would still grant summary judgment in favor of Parma because the NAACP lacked standing. Specifically, the district court held that the NAACP lacked standing because "none of the individuals identified as members of the organization have standing in their own right." J.A. at 62.

In reaching this conclusion, the district court first asserted that each individual plaintiff had to show that there was a substantial likelihood that the alleged injurious practice or practices would be applied to him or her to establish an injury-in-fact, one prerequisite for standing. J.A. at 66. The district court further noted that, because the NAACP sought only prospective relief and because "the *only* injury which [the district court] possibly could remedy in this case [was] a *future* injury," an individual plaintiff would have to show that "he or she still seeks to work for Parma, and has taken some

action toward that end . . . that shows a present intent" in order to establish an injury-in-fact. J.A. at 67, 68.

The district court then analyzed each individual plaintiff to determine if he or she had standing. In so doing, the district court held that (1) Collins and McIntosh lacked standing because they were not members of the NAACP at any time during the litigation, *see* J.A. at 69; (2) Crayton lacked standing because she had "not inquired about obtaining a position with the Parma Police or taken any other steps which would indicate a sincere desire or genuine interest in obtaining such a position" since 1990 and thus failed to show imminent injury and because "her claim [was] premised solely on her failure of the agility portion of the police examination," which she contends "was a product of gender discrimination" and thus failed to demonstrate causation and redressability, *see* J.A. at 70; (3) Tomblin lacked standing because he had shown only that he was "'generally interested'" in working for Parma and because the elimination of the residency requirement "serves to redress the very injury about which Tomblin complained," *see* J.A. at 72-73; (4) Blanton lacked standing because he had no further interest in working for the Parma police department and because he had failed to show redressability because his complaint did not concern Parma's residency requirement or recruitment practices but its refusal to retain him on its eligibility list, *see* J.A. at 74-75; (5) Childress lacked standing because she "has never contacted or taken even the smallest step to determine what she would have to do to obtain employment with Parma" and "has absolutely no interest in applying for employment with Parma" and thus can establish no injury-in-fact, *see* J.A. at 75; and (6) Allen lacked standing because he lived in Atlanta and had no interest in returning to the Cleveland area, *see* J.A. at 75.

After discussing each individual plaintiff, the district court then noted that Tomblin, Childress, and Blanton did not have standing for an additional reason: they failed to maintain their membership throughout the entire litigation. According to the district court, for the NAACP to continue this lawsuit based upon standing through a particular member of the NAACP, that member had to maintain his membership until the completion of litigation to ensure that such member had some level of control over the organization throughout the litigation. J.A. at 79-80. In other words, according to the district court, standing must exist not only at the start of a case but also throughout its course.

II. ANALYSIS

We review de novo a district court's grant of summary judgment. *See Nguyen v. City of Cleveland*, 229 F.3d 559, 562 (6th Cir. 2000). Summary judgment is proper only when there is no dispute as to a material question of fact and one party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c). Viewing all facts and inferences drawn therefrom in the light most favorable to the nonmovant, we then determine whether the evidence presented is such that a reasonable jury could find for that party. *See Nguyen*, 229 F.3d at 562 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)).

A. STANDING

The NAACP argues that the district court erred in determining that the NAACP did not have standing to pursue its claims. Whether a party has standing is a legal question

reviewed de novo. *Ohio Ass'n of Indep. Schs. v. Goff*, 92 F.3d 419, 421 (6th Cir. 1996), *cert. denied*, 520 U.S. 1104, 137 L. Ed. 2d 309, 117 S. Ct. 1107 (1997). To satisfy Article III's standing requirements, a plaintiff must show: "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180-81, 145 L. Ed. 2d 610, 120 S. Ct. 693 (2000) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992)). An association may obtain "standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." 528 U.S. at 181 (citing *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977)).

After careful review, we conclude that the district court erred in determining that the NAACP did not have standing to bring the case. Instead, we hold that the NAACP had standing to sue on behalf of Tomblin, who satisfied all the necessary requirements for standing.

1. When Standing Is Determined

Before we discuss how the NAACP obtained associational standing through Tomblin, we must first address

the question of when standing is to be determined. Our review of Supreme Court and Sixth Circuit case law informs us that, contrary to the district court's conclusion, standing does not have to be maintained throughout all stages of litigation. Instead, it is to be determined as of the time the complaint is filed.

The Supreme Court has consistently held that "jurisdiction is tested by the facts as they existed when the action [was] brought" and "'that after vesting, it cannot be ousted by subsequent events.'" *Smith v. Sperling*, 354 U.S. 91, 93 n.1, 1 L. Ed. 2d 1205, 77 S. Ct. 1112 (1957) (quoting *Mullen v. Torrance*, 22 U.S. 537, 539, 6 L. Ed. 154 (1824)); *see also Freeport-McMoRan Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428, 112 L. Ed. 2d 951, 111 S. Ct. 858 (1991). In *Friends of the Earth*, the Supreme Court applied its "longstanding rule that jurisdiction is to be assessed under the facts existing when the complaint is filed" *Lujan*, 504 U.S. at 570 n.4, when it concluded that the plaintiffs had standing to seek both injunctive relief and civil penalties. In support of its holding, the Supreme Court repeatedly noted that the plaintiffs' injuries were occurring as of the time their complaint was filed. *See*, e.g., *Friends of the Earth*, 528 U.S. at 184 ("Here, in contrast, it is undisputed that [the] unlawful conduct . . . was *occurring at the time the complaint was filed.*"); 185 ("It can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to illegal conduct *ongoing at the time of suit* . . . .") (emphasis added); *see also Becker v. Federal Election Comm'n*, 230 F.3d 381, 386 n.3 (1st Cir. 2000) (noting that *Lujan* "clearly indicat[es] that standing is to be 'assessed under the facts existing when the complaint is filed'"); *White v. Lee*, 227 F.3d 1214, 1243 (9th Cir. 2000) ("Standing is examined at 'the commencement

of the litigation.'"); *Park v. Forest Serv. of the United States*, 205 F.3d 1034, 1037 (8th Cir. 2000) ("We do not think, however, that the actual use of checkpoints in 1997, 1998, and 1999 is relevant on the issue of standing because all of these events occurred after [the plaintiff] filed her original complaint."); *Perry v. Village of Arlington Heights*, 186 F.3d 826, 830 (7th Cir. 1999) ("Because standing goes to the jurisdiction of a federal court to hear a particular case, it must exist at the commencement of the suit."); *Carr v. Alta Verde Indus., Inc.*, 931 F.2d 1055, 1061 (5th Cir. 1991) ("As with all questions of subject matter jurisdiction except mootness, standing is determined as of the date of the filing of the complaint, and subsequent events do not deprive the court of jurisdiction."). The Supreme Court then held that the plaintiff in *Friends of the Earth* had standing to assert its claims because the plaintiff had successfully shown that its injury occurred at the time the complaint was filed. In reaching this decision, the Supreme Court distinguished *Friends of the Earth* from *City of Los Angeles v. Lyons*, 461 U.S. 95, 75 L. Ed. 2d 675, 103 S. Ct. 1660 (1983), in which it held that a plaintiff lacked standing to seek an injunction against the enforcement of a police chokehold policy because he could not credibly allege that he faced a realistic threat from that policy, stating "[h]ere [in *Friends of the Earth*], in contrast, it is undisputed that [the defendant's] unlawful conduct . . . *was occurring at the time the complaint was filed.*" *Friends of the Earth*, 528 U.S. at 184 (emphasis added).

The Supreme Court then proceeded to explain how mootness is distinct from standing, noting that the "[s]tanding doctrine functions to ensure, among other things, that the scarce resources of the federal courts are devoted to those disputes in which parties have a concrete stake" while "by the

time mootness is an issue, the case has been brought and litigated, often (as here) for years." *Id.* at 191. In other words, whereas standing requires proof "that, if unchecked by litigation, the defendant's allegedly wrongful behavior will likely occur or continue, and that the 'threatened injury [is] certainly impending,'" a claim of mootness based on voluntary compliance mandates proof that "the allegedly wrongful behavior [cannot] reasonably be expected to recur." *Id.* at 190 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 158, 109 L. Ed. 2d 135, 110 S. Ct. 1717 (1990)) (alteration in original). In essence, standing concerns only whether a plaintiff has a viable claim that a defendant's unlawful conduct "was occurring at the time the complaint was filed," 524 U.S. at 184, while mootness addresses whether that plaintiff continues to have an interest in the outcome of the litigation. *See, e.g., Arizonans for Official English v. Arizona*, 520 U.S. 43, 67, 137 L. Ed. 2d 170, 117 S. Ct. 1055 (1997) ("As a state employee subject to Article XXVIII, Yniquez had a viable claim at the outset of the litigation in late 1988. . . . Yniquez left her state job in April 1990 to take up employment in the private sector, where her speech was not governed by Article XXVIII. At that point, it became plain that she lacked a still vital claim for prospective relief [and that her claim was moot]."); *see also Friends of the Earth*, 528 U.S. at 192 *(describing Arizonans for Official English)*.

Applying the principles of *Friends of the Earth*, we believe that it is clear that the NAACP only needed to establish standing at the time that its complaint was filed. Indeed, in *Senter v. General Motors Corp.*, 532 F.2d 511 (6th Cir.), *cert. denied*, 429 U.S. 870, 50 L. Ed. 2d 150, 97 S. Ct. 182 (1976), this court highlighted the importance of determining standing as of the time of the complaint in Title

VII cases, such as this one. In *Senter*, an employer challenged an employee's standing to bring a class action based upon alleged discrimination in the company's promotional practices, arguing that the employee had suffered no injury because he was given several opportunities for promotion but rejected them. 532 F.2d at 518. After noting that there was evidence which showed that the employee had in fact been denied promotions and that the employee had not been offered any promotions until after he had filed a grievance, we held that "[s]tanding is determined as of the date the suit is filed," *see id.* at 520, and that the "offer of promotion following complaint to the EEOC [did not] affect[] [the employee's] standing to raise the class issue," *see id.* at 519. As the *Senter* court explained, were it to hold otherwise, an employer could "negate an employee's standing to challenge discriminatory employment practices by the simple expedient of offering [the employee] unilaterally the relief he seeks for the class." *Id.* Here, the same reasoning applies. If, for example, we were to require an evaluation of standing throughout a Title VII case, in particular cases we would in effect be creating a loophole through which employers could avoid review of their hiring practices by either offering an employee the relief he seeks or by delaying the progress of the case such that the employee no longer maintained an interest in the job. Therefore, as the Supreme Court held in *Friends of the Earth*, we conclude that the court must determine whether standing exists at the time of the filing of the complaint only.[11]

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[11] We join the First, Fifth, Seventh, Eighth, and Ninth Circuits, which have all explicitly held that standing is determined as of the time the complaint is filed. *See Becker v. Federal Election Comm'n*, 230 F.3d 381, 386 n.3 (1st Cir. 2000); *White v. Lee*, 227 F.3d 1214, 1243 (9th Cir. 2000); *Park v. Forest Serv. of the United*

2. Associational Standing Through Tomblin

After reviewing the record to determine if the NAACP established standing as of the filing of its complaint, we conclude that the NAACP successfully obtained associational standing through Tomblin and therefore may pursue the claims it makes. Parma does not contest whether the interests at stake are germane to the NAACP's purpose or whether the claim or relief requested requires the participation of individual members; instead, it contests only whether the seven individuals listed in the NAACP's complaint have standing to sue in their own right. Of these seven individuals, Tomblin has standing to sue in his own right, as the NAACP has presented evidence demonstrating that Tomblin suffered a concrete and actual injury, that such injury was traceable to challenged actions by Parma, and that such injury is redressable by a favorable decision.

a. Injury

First, the NAACP presented evidence demonstrating that Tomblin suffered a concrete and actual injury. The NAACP submitted evidence to show that, at the time it filed the complaint, Tomblin had been injured by employment practices that classified black applicants in a way that deprived them of an opportunity to compete for municipal jobs in

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States, 205 F.3d 1034, 1037 (8th Cir. 2000); *Perry v. Village of Arlington Heights*, 186 F.3d 826, 831 (7th Cir. 1999); *Carr v. Alta Verde Indus., Inc.*, 931 F.2d 1055, 1061 (5th Cir. 1991). These cases are cited more thoroughly above. *See supra* pp. 17-18.

Parma.[12] Specifically, the NAACP provided evidence showing that Tomblin was injured by Parma's move-in residency requirement, by Parma's use of word-of-mouth hiring practices and City Hall postings, by Parma's alleged failure to advertise municipal job openings in a manner that may help to recruit Blacks to its workforce, and by Parma's alleged failure to abide by its practice of routinely mailing notifications of civil service examinations and openings to interested applicants.

In particular, the NAACP presented evidence showing that, in 1990, Tomblin chose not to sit for a 1990 civil service examination in Parma because of the city's move-in residency requirement. J.A. at 649. During his 1997 deposition, Tomblin testified to the following:

> Q: But you didn't actually sit for any civil service examination at that time, is that correct?
>
> A: No. Certainly not.
>
> Q: And that's because you decided not to for what reason?
>
> A: *The fact the residency requirement was really a problem, knowing that the City of*

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[12] On December 20, 1991, Tomblin was included in the NAACP's first amendment to its complaint, which was entered pursuant to the district court's December 12, 1991 order requiring the NAACP to submit "'further particularized allegations of fact.'" J.A. at 11, 206-07.

> *Parma has a reputation of discrimination in housing and it's well known in the black community and throughout the minority community that it is not a place where we are welcomed. I didn't see the point in that.*

J.A. at 649 (1997 Tomblin Dep.) (emphasis added).[13]

The NAACP also provided evidence demonstrating that, in February of 1990, Tomblin submitted an application for employment with Parma and requested that he be notified of the next available civil service examination so that he could pursue employment with the Parma police department, but that Parma failed to follow its alleged practice of sending routine notifications through the mail and thus failed to inform Tomblin of the city's next civil service examination. The next civil service examination, which was offered on June 1, 1991, and June 23, 1991, served as the basis for creating a July 11, 1991 eligibility list from which two new police officers were hired in 1993.[14] J.A. at 240, 921; *see also* J.A. at 224. As

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[13] We assume that Tomblin is referring to the physical portion of Parma's civil service examination, which was given on February 11, 1990. Parma offered the written portion of its civil service examination on November 29, 1989 and the physical portion on February 11, 1990. J.A. at 30.

[14] We do not believe that Tomblin's assertion that he did not sit for a civil service examination in 1990 due to Parma's move-in residency requirement is inconsistent with his claim that he was injured by Parma's failure to notify him of its June 1991 civil service examination. At a minimum, Tomblin was entitled to have the opportunity to decide if he wished to take the examination.

evidence of Tomblin's injury, the NAACP presented Tomblin's EEOC affidavit, in which Tomblin stated:

> I applied for a position of Safety Forces or Administrative Clerk in February, 1990. At that time, I was informed that my application would be kept and I would be notified of any Civil Services test given.
>
> I am aware that a test is given at least yearly for police and fire fighter[s]. I have never been notified of any test.

J.A. at 240; *see also* J.A. at 212 (First Amendment To The Complaint). Additionally, the NAACP presented a January 20, 1993 letter, in which Gerianne Vanek, Parma's personnel director, noted that Tomblin had submitted an application and signed up for Parma's mailing list in February 1990. J.A. at 921.

In addition to providing evidence of Tomblin's injury due to Parma's failure to notify Tomblin of available civil service examinations, the NAACP presented evidence demonstrating that, at the time it filed the complaint, Tomblin suffered a similar injury due to Parma's use of word-of-mouth hiring practices and City Hall postings and by Parma's alleged failure to advertise its municipal positions in manner that could more easily reach Blacks in the greater Cleveland community. *Cf. Thomas v. Washington County Sch. Bd.*, 915 F.2d 922, 925 (4th Cir. 1990) (noting that "word-of-mouth hiring, . . . in the context of a predominantly white work force, [s]erves to freeze the effects of past discrimination"). According to the NAACP, because of Parma's allegedly

deficient advertising,[15] Tomblin (and other Blacks) did not learn of the dates for Parma's civil service examinations or of any of Parma's municipal job openings.

More importantly, the NAACP demonstrated that Tomblin's injury was such that it warranted injunctive relief. The Supreme Court has consistently noted that, unless a past injury is accompanied by "continuing, present adverse effects, "it" does not in itself show a present case or controversy regarding injunctive relief." *Lyons*, 461 U.S. at 102 (quoting *O'Shea v. Littleton*, 414 U.S. 488, 495-96, 38 L. Ed. 2d 674, 94 S. Ct. 669 (1974)). The Supreme Court has further specified that "'some day' intentions -- without any description of concrete plans, or indeed even any specification of *when* the some day will be" are insufficient to support a finding of the kind of injury required to warrant injunctive relief. *Lujan*, 504 U.S. at 564; *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211, 132 L. Ed. 2d 158, 115 S. Ct. 2097 (1995). In this case, at the time the NAACP filed its complaint, Tomblin had more than "some day intentions" of seeking and obtaining employment with Parma. In fact, as shown by Tomblin's correspondence with the city, he was still attempting to obtain employment with Parma as late as May 1993. As of May 4, 1993, Tomblin had written Parma the following letter to express his interest in

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[15] Parma presented evidence of job advertisements in several Cleveland newspapers, including those with black readerships, and of its efforts to recruit minorities in Cleveland's local colleges. Most of this evidence, however, concerns only practices which were undertaken in 1996 and thereafter. *See infra* Part II(B)(2).

obtaining employment with Parma as a police officer or firefighter:

> I'm disstressed [sic] over the fact that you stated that I would be notified of all upcoming Police and Fire exams. I was not notified of any exams, past or present. I don't believe that you realize the importance in me [sic] receiving notification of upcoming Police and Fire exams.
>
> Not being notified of past exams limits my opportunity to become a Police Officer for the City of Parma due to the fact that such openings are highly sought after and there is historically very little employment turn-over within Parma's safety forces. I would appreciate a response to why I was not properly notified, presumedly, like other prospective Civil Service applicants.

J.A. at 677. In sum, we conclude that, at the time the NAACP filed its complaint, Tomblin had satisfied the first requirement necessary for Article III standing: proof of injury.

b. Causation

Second, the NAACP provided evidence showing that Tomblin's injuries were fairly traceable to the challenged actions of Parma. To begin, the NAACP submitted Tomblin's deposition testimony in which Tomblin asserted that he decided not to sit for a civil service examination in 1990 because of Parma's move-in residency requirement. J.A. at 649.

Then, through Tomblin's testimony and correspondence between Tomblin and Parma, the NAACP showed that Tomblin's injury from failing to hear about available civil service examinations or job opportunities in Parma was fairly traceable to Parma's alleged failure to follow its practice of routinely mailing notifications of jobs and examinations. Likewise, the NAACP presented evidence that showed that Tomblin's injuries were fairly traceable to Parma's use of word-of-mouth hiring practices and City Hall postings as well as to Parma's failure during the relevant time frame to advertise in a manner that was more likely to reach Blacks in the greater Cleveland community, as such practices arguably prevented Tomblin, a black non-resident of Parma, from learning about available municipal positions and civil service examinations. As many courts have recognized, in the context of a virtually all-white workforce and a virtually all-white city (as Parma certainly was between 1990 and 1994 when Tomblin was actively seeking a job with the city), word-of-mouth hiring and similar types of recruiting practices, such as posting job openings in the municipal buildings of a non-diverse city, have a "tendency to perpetuate the all-white composition of a work force." *Thomas*, 915 F.2d at 925 (citation omitted); *see also Barnett v. W.T. Grant Co.*, 518 F.2d 543, 549 (4th Cir. 1975). While Parma has submitted evidence of its efforts to recruit minorities to its workforce through advertisements in newspapers, its evidence primarily concerns advertisements run in 1996, *see* J.A. at 340-47, 358-60, 1069-78, 1302-09, and only four advertisements (all for the same examination) made between 1990 and 1994,[16] when

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[16] The only other pre-1996 evidence concerns four advertisements run in May of 1991 for civil service examinations held in June 1991, the first examination for which Tomblin claims

Tomblin was actively seeking a job with Parma. In sum, we conclude that, at the time the NAACP filed its complaint, Tomblin had satisfied the second requirement necessary for Article III standing: that his injuries were fairly traceable to the challenged actions.

c. Redressability

Third, the NAACP presented evidence demonstrating that Tomblin's injuries are redressable by a favorable decision, as Tomblin would benefit from an injunction prohibiting Parma from using its allegedly discriminatory recruitment, selection, and hiring practices. Indeed, Tomblin expressly stated that he was "currently interested in working for the Parma Fire Department" and that he would seriously consider a job in Parma if the "police department, city council, and city government" abolished their past discriminatory ways and attitudes. J.A. at 660-61.

The fact that Tomblin does not express a present concrete interest in obtaining employment in Parma does not divest him, and consequently the NAACP, of standing. As the Supreme Court has previously recognized, Title VII litigation often involves lengthy delays, and "[t]he extended time it frequently takes to obtain satisfaction in the courts may force a discrimination claimant to suffer through years of underemployment or unemployment" before any resolution occurs. *Ford Motor Co. v. EEOC*, 458 U.S. 219, 221, 73 L. Ed. 2d 721, 102 S. Ct. 3057 (1982). To allow employers to negate a plaintiff's standing by strategically delaying

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he was not notified. Supp. J.A. at 153-55; J.A. at 1069-78.

resolution of an employment discrimination case until the plaintiff is no longer interested in obtaining the position would place any plaintiff, including those seeking only injunctive relief, in an impossible dilemma. In most cases, a plaintiff "cannot afford to stand aside while the wheels of justice grind slowly toward the ultimate resolution of the lawsuit. . . . A job is needed -- now." *Id.* Therefore, requiring a plaintiff to maintain a concrete interest in the sought-after employment throughout all stages of the litigation would effectively force that plaintiff to choose between finding new employment to feed and shelter himself and his family and foregoing other employment to maintain his standing to sue. Additionally, such a requirement would unjustly compel a plaintiff, who was seeking injunctive relief and who was fortunate enough to find satisfactory employment elsewhere, to assert a present, concrete interest in a position that he had applied for in the distant past, even though a delayed move to that position could require the plaintiff to lose valued seniority, benefits, and status he had accrued at his current job during the pendency of often lengthy litigation.[17] *Cf. Senter*, 532 F.2d at 519 ("It would be anomalous to hold that an employee, in the process of exhausting administrative remedies, should lose standing to contest the very practices of which he complained

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[17] In cases where the plaintiff is also seeking monetary relief, such as backpay, such a requirement would force a plaintiff to fail in his duty to mitigate damages by seeking substantially comparable work so that he could maintain standing, which would, in turn, strip the plaintiff of any claim to backpay. *See Suggs v. Servicemaster Educ. Food Mgmt.*, 72 F.3d 1228, 1233 (6th Cir. 1996) ("A plaintiff in an action under Title VII has a duty to mitigate damages; she may not remain unemployed and collect a windfall.").

in his charge to the EEOC merely because his employer, in the interim, offers him a promotion which he rejects."). In sum, the NAACP has presented evidence to show that Tomblin satisfies the redressability requirement[18] and thus has shown that it has standing to bring this lawsuit.[19]

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[18] Moreover, as this court noted in *Gillis*, "once an organization has alleged actual injury to 'its members, *or any one of them* . . . it may then argue on behalf of the 'public interest.' . . . By joining an organization dedicated to a particular goal in the public interest, members indicate a willingness to make certain sacrifices productive of that goal.'" *Gillis*, 759 F.2d at 572 (quotations omitted).

[19] Because Tomblin was a member of the NAACP at the time the NAACP filed its complaint and the NAACP has presented evidence to demonstrate that Tomblin had standing to sue in his own right at the time it filed its complaint, we need not address whether Collins, Childress, Blanton, or McIntosh did not have standing to sue in their own right because they were not members of the NAACP at the time the complaint was filed. Although Allen was a member of the NAACP at the time the complaint was filed, the NAACP could not obtain associational standing through Allen because he never submitted an application to Parma, never inquired about jobs in Parma, or even asserted that he would have applied had he seen or heard any advertisements and therefore suffered no actual injury. J.A. at 836-46. Finally, although Crayton was a member of the NAACP at the time the complaint was filed, the NAACP could not obtain associational standing through her because Crayton could not show that Parma's decision not to hire her was fairly traceable to her race. J.A. at 584-85.

As noted earlier, Parma does not dispute that the interests at stake are germane to the NAACP's purpose or that the NAACP's claims do not require the participation of individual members.

B. MOOTNESS

The NAACP also argues that the district court erred in granting summary judgment on mootness grounds. We review de novo a district court's decision regarding mootness. *Craft v. United States*, 233 F.3d 358, 373 (6th Cir. 2000).

A federal court has no authority to render a decision upon moot questions or to declare rules of law that cannot affect the matter at issue. *Church of Scientology v. United States*, 506 U.S. 9, 12, 121 L. Ed. 2d 313, 113 S. Ct. 447 (1992). A case becomes moot "'when the issues presented are no longer 'live' or parties lack a legally cognizable interest in the outcome.'" *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 59 L. Ed. 2d 642, 99 S. Ct. 1379 (1979) (quoting *Powell v. McCormack*, 395 U.S. 486, 496, 23 L. Ed. 2d 491, 89 S. Ct. 1944 (1969)). In other words, a case becomes moot only when subsequent events make it absolutely clear that the allegedly wrongful behavior cannot reasonably be expected to recur and "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Id.* The heavy burden of demonstrating mootness rests on the party claiming mootness. *Id.*

In this case, we conclude that the district court erred in determining that the NAACP's claims regarding Parma's alleged discriminatory recruitment, selection, and hiring practices had become moot. We believe that Parma failed to meet its burden of proving mootness.

1. Likely To Recur

First, Parma failed to prove that its alleged discriminatory recruitment, selection, and hiring practices,

including the use of a residency requirement, could not reasonably be expected to recur. Indeed, Parma failed to show that its alleged discriminatory practices had ceased at all. *See Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662, 124 L. Ed. 2d 586, 113 S. Ct. 2297 (1993) ("There is no mere risk that Jacksonville will repeat its allegedly wrongful conduct; it has already done so."). As an initial matter, Parma failed to rebut the NAACP's proof of a genuine issue of material fact regarding whether Parma was still enforcing a residency requirement even after it had officially repealed such requirement in 1988. Less than two years after repealing its residency requirement, Parma had hired a total of six individuals, Greg Kohler, Vincent Semanik, Robert Tarro, Joseph Bobak, Daniel Heinz, and Orville Hildebrand, from an eligibility list that was created before Parma repealed its residency requirement. *See* Supp. J.A. at 58; J.A. at 974, 977-78, 982, 984. Additionally, as the evidence presented by the NAACP revealed, almost five years after Parma had "officially" repealed its residency requirement, Parma's personnel director informed a black applicant, specifically Tomblin, that "the residency requirement still applies in the City of Parma." J.A. at 921. On January 20, 1993, the personnel director wrote in response to an inquiry from Tomblin:

> The Personnel Department is in receipt of your inquiry regarding employment with the City of Parma.
>
> Your resume and cover letter remain active in our file but we are providing you another

> application due to the fact your application dates back to February of 1990.
>
> *The residency requirement still applies in the City of Parma.*

J.A. at 921 (emphasis added).

Moreover, the evidence in the record suggests that Parma may have a "de facto" residency requirement, revealing that, despite the official elimination of its residency requirement in 1988, Parma stills asks a municipal job applicant a variety of questions regarding his connection to the city, including the number of years and months that the applicant has resided in Parma; whether the applicant has any relatives employed by the Parma; who recommended the applicant for employment with Parma; and where the recommender(s) lived. J.A. at 1183. Additionally, the evidence shows that, despite the repeal of the residency requirement in Parma, the overwhelming majority of new hires for Parma are Parma residents. For example, in 1997, twenty-five out of the twenty-eight applicants who secured employment with Parma were already residents of Parma, and eight of those twenty-eight applicants had close relatives who were Parma employees. J.A. at 1380-1473.

In addition to failing to prove that it was not still enforcing a residency requirement for municipal jobs, Parma also failed to show that it had stopped its alleged discriminatory practices with regard to advertising jobs to recruit black workers and with regard to the actual recruitment of black workers to its municipal workforce. For example, Parma failed to rebut completely the NAACP's

evidence that Parma hires many of its municipal employees from City Hall postings and through word-of-mouth from its municipal employees, two methods which are claimed to have a disproportionate impact on Blacks. As the evidence in the record reveals, in 1995 and 1996, Parma hired a substantial number of its full-time municipal employees from its pool of provisional, part-time, or temporary employees, many of whom were recommended by current employees of Parma. J.A. at 1188-1216, 1230-31. Out of thirteen full-time positions posted for new hires between November 20, 1995, and March 8, 1996, at least six were filled by former part-time employees, and two others were filled by transfer or promotion without any indication of a change from part-time to full-time.[20] J.A. at 1165, 1189-1217. While Parma produced evidence of its attempts to recruit Blacks through local schools and local newspapers, including those with predominantly black readerships, such evidence was sparse.

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[20] Likewise, during his deposition in December 1990, Jack Krise, the cash manager for Parma testified that just about every person he hired in Parma's tax division was a part-time employee or had been recommended by a current employee of Parma:

> A: In just about every case, it's been somebody who knows somebody to recommend. Usually I will indicate to the office through -- nothing formal. I don't say hey, I need to hire somebody, but somebody will hear, if you need anybody, and you know our filing is backing up, and we can sure use a person, I have somebody I can recommend, and that's generally how it's been.

J.A. at 1231 (1990 Krise Dep.).

See infra Part II(B)(2). In sum, Parma failed to show that the recruitment, selection, and hiring practices challenged in this lawsuit are not likely to recur in the future.

2. Interim Relief Or Events Eradicating Effects

Second, Parma failed to prove that interim relief or events had irrevocably eradicated the effects of the allegedly discriminatory conduct. Although Parma claimed that it eradicated the effects of its allegedly discriminatory conduct through expanding its methods of advertising to recruit minorities through developing and distributing brochures at local colleges and malls and listing scheduled civil service examinations in various Cleveland newspapers, its proof of these new advertising schemes was scarce. *See*, e.g., J.A. at 337. Parma presented evidence of newspaper advertisements covering *only four* civil service examinations over the course of a ten-year period: (1) a police officer examination in June 1991; (2) a clerk typist examination in February or March 1996; (3) a firefighter examination in March 1996; and (4) a police officer examination in May 1996. Such evidence included (1) two Cleveland *Plain Dealer* and three *Sun Post* advertisements in Lakewood, and Brunswick, Ohio (two suburbs for which Parma provided no statistics concerning their racial composition) for an examination on June 1, 1991, *see* J.A. at 1069-72; Supp. J.A. at 153-55 (2) individual letters ordering advertisements in the Cleveland *Plain Dealer*, *Sun* Newspapers, *The Call & Post*, and Cuyahoga Community College for an examination on March 16, 1996, *see* J.A. at 340-47, 1302-05; and (3) individual letters ordering advertisements in the Cleveland *Plain Dealer*, *Sun* Newspapers, and *The Call & Post*, for an examination on May 4, 1996, *see* J.A. at 340-47, 1307-09. Parma also

presented deposition testimony from Elizabeth Woolson, Secretary of the Civil Service Commission, who testified to Parma's placing two clerk typist advertisements in February 1996, two police officer advertisements in April 1996, one firefighter advertisement in February 1996, in the *Plain Dealer*, *see* J.A. at 340-43, 358, 365, 367; one firefighter advertisement and one clerk typist advertisement in February 1996 and two police officer advertisements in *The Call & Post* in April 1996, *see* J.A. at 322-24, 359, 368; one clerk typist advertisement in February 1996 and two police officer and firefighter advertisements in the *Sun* newspapers in April 1996,[21] *see* J.A. at 322-24, 342, 360, 364.

The alleged deficiency in Parma's recruitment efforts has arguably resulted in virtually no change in the racial composition of Parma's municipal workforce, even further indicating Parma's failure to eradicate the effects of the allegedly discriminatory actions in this case. As the evidence shows, despite the elimination of Parma's official residency requirement and its allegedly increased recruitment efforts through local newspapers and schools, the percentage of black workers in Parma's municipal workforce has still remained practically non-existent. For example, between 1988 and 1996, Parma had hired only three black full-time employees out of more than 460 full-time municipal employees, resulting in Blacks comprising only .26% of the city's entire municipal

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[21] Blanton and Childress, however, did testify that they may have seen advertisements for a civil service examination in Parma in 1989 and 1990. J.A. at 574, 717. McIntosh stated that he had received notification of a civil service examination in the mail in 1993. J.A. at 609.

workforce in 1996. As Hammerman noted in his affidavit, this percentage of black employees in Parma's public sector was exceedingly low, equaling less than one-ninth of the percentage in its private sector, one-fifteenth of that in the private sector of the Cleveland metropolitan area, and one-thirty-second of that in the public sector of the Cleveland metropolitan area. *See* J.A. at 957 (1997 Expert Report of Herbert Hammerman). In sum, contrary to the district court's conclusion, we conclude that Parma failed to show that its interim actions completely eradicated the effects of its allegedly discriminatory conduct in applying a "residency" requirement and in failing to advertise in a manner effective for reaching Blacks in the greater Cleveland community.

C. RIPENESS

Parma argues that the NAACP's claims are not ripe for adjudication. "Ripeness requires that the 'injury in fact be certainly impending.'" *National Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 280 (6th Cir. 1997) (citation omitted). "Ripeness becomes an issue when a case is anchored in future events that may not occur as anticipated, or at all." *Magaw*, 132 F.3d at 284. Thus, ripeness is "a question of timing." *Id.* A ripeness inquiry requires an analysis of two factors: (1) whether the issues at stake are fit for judicial decision; and (2) the extent of the hardship to the parties of withholding court consideration. *Nationwide Mut. Ins. Co. v. Cisneros*, 52 F.3d 1351, 1362 (6th Cir. 1995), *cert. denied*, 516 U.S. 1140, 133 L. Ed. 2d 893, 116 S. Ct. 973 (1996).

In this case, Parma challenges only the first factor of the ripeness inquiry, arguing that the NAACP's claims are not ripe because "[n]o NAACP members allege that any of

Parma's past or present residency requirements were ever applied to them in a concrete fashion." Parma's Br. at 44. Parma's argument is completely without merit.

This case is not anchored in future events that have not occurred, but in events that have already occurred. As already noted, one NAACP member, Tomblin, did assert that Parma's residency requirements were applied to him in a concrete way. Specifically, Tomblin asserted that he was deterred from sitting for a civil service examination in Parma in 1990 because of the city's move-in residency requirement. J.A. at 649. Furthermore, as shown by the NAACP's complaint, the NAACP is challenging more than the application of Parma's past and present residency requirements, including Parma's refusal to treat black and white applicants equally, its use of word-of-mouth hiring and City Hall postings, and its minimal advertising. As evidenced by Tomblin's EEOC affidavit and deposition testimony, claims regarding these practices are ripe for adjudication, as the NAACP has created a genuine issue of material fact regarding whether Tomblin and other Blacks were harmed by Parma's allegedly discriminatory recruitment, selection, and hiring practices.

D. BREADTH OF THE EEOC CHARGE

Finally, the NAACP argues that the district court erred by limiting the scope of this action to a challenge to Parma's former residency requirement and alleged practice of limiting the recruitment of municipal employees to word-of-mouth through friends and relatives of Parma's municipal employees and by excluding any challenges to the testing procedures and examinations used by Parma. We agree with the NAACP.

The purpose of filing a charge of discrimination is to trigger the investigatory and conciliatory procedures of the EEOC. An EEOC charge notifies potential defendants of the nature of a plaintiff's claims and provides the opportunity for the parties to settle claims before the EEOC instead of litigate them. *Davis v. Sodexho, Cumberland Coll. Cafeteria*, 157 F.3d 460, 463 (6th Cir. 1998). Therefore, courts preclude a plaintiff from asserting a claim that was not within the scope of his EEOC charge. However, "[b]ecause Title VII is a remedial statute, many courts refuse to narrowly construe the charge where such a construction would preclude a plaintiff from bringing a claim." *Ang v. Procter & Gamble Co.*, 932 F.2d 540, 546 (6th Cir. 1991). Consequently, "[c]ourts have expanded upon the charge filing requirement . . . to provide that a party's discrimination claim . . . may include claims 'limited to the scope of the EEOC investigation reasonably expected to grow out of the charge of discrimination.'" *Davis*, 157 F.3d at 463 (quoting *EEOC v. McCall Printing Corp.*, 633 F.2d 1232, 1235 (6th Cir. 1980)); *see also Duggins v. Steak 'N Shake, Inc.*, 195 F.3d 828, 832 (6th Cir. 1999) (holding that the district court erred by not considering evidence of alleged retaliatory acts where the plaintiff "related facts to the EEOC which would have prompted an investigation into retaliation"); *Farmer v. ARA Servs., Inc.*, 660 F.2d 1096, 1105 (6th Cir. 1981) (holding that the charge of the female plaintiffs, which specified denial of fair representation by their union, would have led the EEOC to investigate the plaintiffs' equal pay claim and challenge to certain collective bargaining provisions).

We conclude that the district court erred in determining that the NAACP's challenge to Parma's police, firefighter, and other examinations did not fit within the scope

of its EEOC charge. While much of the NAACP's charge focuses on Parma's residency requirements and recruiting practices, it also explicitly refers to Parma's hiring practices with "*civil service jobs*" and notes that "Parma discriminates in hiring by refusing to recruit, consider, *select* and employ blacks on the same basis as whites." J.A. at 193 (emphasis added). In light of the fact that civil service examinations are the very means by which Parma creates the eligibility lists for its civil service jobs, we believe that it was error to conclude that an investigation of such examinations would not reasonably be expected to grow out of the NAACP's charge of discrimination.

Furthermore, contrary to the district court's assertions, we believe that Parma had notice of the NAACP's intent to challenge Parma's civil service testing procedures and that Parma was not prejudiced by statements made in pleadings filed by the NAACP during this litigation. The NAACP explicitly stated in its complaint that it was challenging Parma's use of "unvalidated selection procedures that have the effect of disproportionately excluding from employment those black applicants who do obtain timely information regarding employment opportunities and who are not deterred by the discriminatory practices of defendant." J.A. at 231. Early in the course of this litigation, the NAACP questioned several of Parma's civil service administrators and other witnesses about the validity of Parma's examinations. J.A. at 1085, 1100-06 (1991 Dep. of James Merlino, Chairman of the Parma Civil Serv. Comm'n); 1245-51, 1259-77 (1991 Dep. of Edward McCaffery). For example, in his deposition in September 1991, James Merlino, the Chairman of the Civil Service Commission was questioned as follows:

Q: And that also from your prior testimony that the test they gave that led to the 1990 police test was the first one, the first test for entry level police officer that McCaffery did for the city of Parma?

A: Yes.

Q: Did Mr. or Captain McCaffery or his associate present to you anything that they described as a validity study to the best of your knowledge?

****

A: For the police entry level examination?

Q: Yes.

A: As I recall, no, they did not present one.

J.A. at 1100-01. Similarly, in September 1991, Edward McCaffery, an individual who had designed one of Parma's police examinations in the early 1990s, engaged in the following colloquy during his deposition:

Q: Turning to your letter, Captain, if you would. And making reference to the written examination with the five parts that are listed on pages 1 and 2 of Plaintiff's Exhibit Number 1. Do you have any knowledge as to whether written examinations of the kind that are described

> here in parts 1, 2, 3, 4 and 5, whether whites and blacks score differently or the same in tests of this kind?
>
> ****
>
> Q: Sure. Have you seen any studies or literature as to whether written examinations of the general kind that you have here as a whole tend to have an adverse impact on blacks?
>
> A: That's quite a jump logically. Yes, I've read material that stated that written examinations did have adverse impact on various groups.

J.A. at 1259-61. Furthermore, Parma knew that one of the NAACP's individual plaintiffs was Crayton, who had failed the agility portion of the police civil service examination and was challenging certain aspects of that test as applied to Blacks. J.A. at 349-52 (1990 Dep. of Elizabeth Woolson, Sec'y of Civil Serv. Comm'n) (questioning Woolson about the procedure for scoring Crayton's examination). In fact, during the course of this litigation, the NAACP presented a October 1991 affidavit from one expert, Lance Seberhagen, regarding the disparate impact that Parma's civil service examination allegedly had on Blacks. J.A. at 930-33. In essence, in light of the NAACP's actions during discovery, Parma cannot now claim ignorance of the NAACP's interest in challenging its testing procedures.

Moreover, the fact that a representative of the NAACP drafted the charge in this case does not require us to conclude that a challenge to Parma's civil service examinations is not within the scope of the charge. While the representative of the NAACP may have been more familiar with "the technicalities of the law" as a result of her work, there is nothing to suggest that such representative was a lawyer or well-versed in the law. *See Ang*, 932 F.2d at 546. Furthermore, the fact that a broader reading of a charge is required where a plaintiff does not have an attorney, *see Duggins*, 195 F.3d at 832 (noting that a broader reading is compelled where a plaintiff is unrepresented by an attorney), does not mean that a broad reading may not, or should not, be given in cases where a plaintiff has counsel. In sum, we hold that the NAACP's challenge to Parma's testing procedures was within the scope of its EEOC charge and, as a result, hold that the district court erred in excluding such challenge from this case.

E. TIMELINESS OF EEOC CHARGE

Parma also argues that the NAACP failed to file its EEOC charge within 300 days of the alleged unlawful employment practice, as required by 42 U.S.C. § 2000e-5(e), because no EEOC charge was filed within 300 days of the enactment of Parma's 1988 ordinance repealing the residency requirement. We reject this argument.

The NAACP was not required to file an EEOC charge within 300 days of the enactment of the 1988 ordinance, as the NAACP argues, in part, that Parma is still according an unfair preference to its residents. Furthermore, as shown by the allegations in the NAACP's complaint, the NAACP is challenging more than Parma's residency requirement,

including its move-in residency requirement and a variety of recruitment, selection, and hiring practices used by Parma both before and after the repeal of its residency requirement. *See* J.A. at 230-31. For example, the NAACP is challenging Parma's use of word-of-mouth hiring practices and its failure to advertise in a manner that could effectively aid the recruitment of Blacks to its municipal workforce.

III. CONCLUSION

In conclusion, we hold that the NAACP established associational standing through Tomblin, that the NAACP's claims are not moot, that the NAACP's claims are ripe, that the NAACP's charge was such that an investigation of Parma's testing procedures could reasonably be expected to grow out of its EEOC charge, and that the NAACP timely filed its charge. For the foregoing reasons, we **REVERSE** the judgment of the district court and **REMAND** for further proceedings consistent with this opinion.

DISSENT:

BOGGS, Circuit Judge, dissenting. I would affirm the district court's decision granting summary judgment to the City of Parma.

I agree with the court that the NAACP had standing to sue Parma at the time the NAACP brought suit. I also agree with the court that the NAACP's claims have not become moot *solely* because of actions that Parma has taken subsequent to the institution of this lawsuit. I believe, however, that the NAACP's claims have become moot because the *sole* NAACP member that the court relies upon

to grant the NAACP standing, Artis Tomblin, has lost a personal interest in this litigation. Tomblin is no longer a member of the NAACP and he no longer has an injury that this court can redress. Since Tomblin no longer has a personal interest in this litigation, his claim, and, therefore, the NAACP's claim, have become moot. Because the court fails to analyze whether Tomblin continues to have a personal interest in this litigation, I respectfully dissent.

I

Both the district court's and our court's opinions appear to conflate standing and mootness. There is an important difference: "The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22, 137 L. Ed. 2d 170, 117 S. Ct. 1055 (1997) (citing *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397, 63 L. Ed. 2d 479, 100 S. Ct. 1202 (1980) (quoting Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973)) (internal quotation omitted). In *Arizonans for Official English*, the Court ruled that a plaintiff who challenged the State of Arizona's policy declaring English the official language of the state by attempting to use her bilingual skills in state employment "mooted the case stated in her complaint" when she resigned from state employment to pursue work in the private sector. *Id.* at 72. The Court noted that the plaintiff's claim sought only injunctive relief and rejected the plaintiff's attempt to revive the case through an implied plea for nominal damages. *Id.* at 68-71.

The distinction between standing and mootness was again discussed in *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 191-92, 145 L. Ed. 2d 610, 120 S. Ct. 693 (2000). There, the Supreme Court stated:

> Standing doctrine functions to ensure, among other things, that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake. In contrast, by the time mootness is an issue, the case has been brought and litigated, often (as here) for years. To abandon the case at an advanced stage may prove more wasteful than frugal. *This argument from sunk costs does not license courts to retain jurisdiction over cases in which one or both of the parties lacks a continuing interest* . . . . But the argument surely highlights an important difference between the two doctrines.

Ibid. (emphasis added). The Court's discussion indicates that although a party may have standing at the time a complaint is filed, and even though a case, such as this one, may continue on for years, a party may lose a continuing interest in the litigation, and therefore cause its claim to become moot.

The requirement that a party must have a personal interest in ongoing litigation in order to avoid mootness is well-recognized within the law:

> Mootness doctrine encompasses the circumstances that destroy the justiciability of a suit previously suitable for determination. It

> is not enough that the initial requirements of standing and ripeness have been satisfied; *the suit must remain alive throughout the course of litigation, to the moment of final appellate disposition*. The need for continuing vitality is attributed both to Article III and to more openly discretionary doctrines of remedial utility and judicial administration.

13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE §3533, at 211 (2d ed. 1984) (emphasis added). This court has noted that, "the mootness inquiry must be made *at every stage of a case*; thus, if a case becomes moot during an appeal, the judgment below must be vacated and the case remanded with instructions to dismiss." *McPherson v. Michigan High Sch. Athletic Ass'n*, 119 F.3d 453, 458 (6th Cir. 1997) (emphasis added). Furthermore, "in analyzing issues of mootness it is helpful to keep in mind that 'these problems often require a highly individualistic, and usually intuitive, appraisal of the facts of each case.'" *McPherson*, 119 F.3d at 465 (Moore, J., dissenting) (quoting WRIGHT ET AL., *supra*, §3533, at 211-12).

The court recognizes the requirement that a plaintiff must continue to have a personal interest in ongoing litigation by citing language to that effect from *Friends of the Earth* and *Arizonans for Official English*. However, the court fails to apply this language and undertake this required analysis, seemingly concluding that once the NAACP met the requirements for associational standing through Tomblin, the NAACP's task in avoiding mootness was over.

The court discusses in great detail the principle that standing must be determined at the time a complaint is filed. I agree that the initial determination of a party's standing to bring a lawsuit must be made at that point. I note, however, that the court's broad statement, "standing does not have to be maintained throughout all stages of litigation," Maj. Op. at p. 17, appears to overrule previous binding authority of this court. This court has previously held that "[a] plaintiff must maintain standing throughout all stages of his litigation." *City Communications, Inc. v. City of Detroit*, 888 F.2d 1081, 1086 (6th Cir. 1989). The court's language, which directly contravenes that of *City Communications*, appears to overrule *City Communications*.

In *City Communications*, 888 F.2d at 1086 n.3, the court noted that its holding "might appear to be at odds" with this court's previous holding in *Senter v. General Motors Corporation*, 532 F.2d 511, 520 (6th Cir. 1976), in which this court stated that "[s]tanding is determined as of the date the suit is filed." The court in this case chooses to apply *Senter* while ignoring *City Communications*. I believe that both cases bind us and both need to be applied to the facts of this case. I believe that the court does not err in applying *Senter*, but I believe that it does err in not applying the legal principles underlying *City Communications*.

The court in *City Communications* uses the language of standing to apply a mootness analysis. The court's statement that a plaintiff must maintain standing throughout all stages of litigation is really a requirement that the plaintiff have a continuing interest in the litigation in order to prevent the litigation from becoming moot. In *City Communications*, the court was determining whether the plaintiff had a

continuing interest in the litigation after the plaintiff had been dissolved and later renewed as a corporation. 888 F.2d at 1086.

As Parma admitted at oral argument, the Supreme Court has not specifically held that standing must be evaluated at the time it is challenged. Instead, the Court has consistently held that a plaintiff must maintain a continuing interest in ongoing litigation. Indeed, the Supreme Court cases cited in *City Communications* for the *proposition* that standing must be evaluated at the time it is challenged do not apply that rule, but rather evaluate whether a party had a continuing interest in ongoing litigation. *See Karcher v. May*, 484 U.S. 72, 77-78, 98 L. Ed. 2d 327, 108 S. Ct. 388 (1987) (holding that former speaker of New Jersey General Assembly and president of New Jersey Senate who intervened and participated in lawsuit challenging constitutionality of New Jersey statute providing for one minute of silence at beginning of school day lost continuing interest in litigation after they lost their status as presiding officers of state legislature); *Golden v. Zwickler*, 394 U.S. 103, 108, 22 L. Ed. 2d 113, 89 S. Ct. 956 (1969) (holding that plaintiff no longer had a continuing interest in declaratory judgment action challenging statute making it a crime to distribute anonymous literature in an election campaign, since plaintiff's claim related to a particular congressman who had left office after the commencement of litigation). Recent Supreme Court cases, namely *Friends of the Earth* and *Arizonans for Official English*, continue to espouse the principle that a plaintiff must have a continuing interest in ongoing litigation.

The *City Communications* court's use of standing language to engage in a mootness inquiry is understandable.

"Mootness principles may indeed blend quite directly with standing . . . . The blend may be reflected simply in the phrases of decisions." WRIGHT ET AL., *supra*, §3533.1, at 219. Certain principles of standing, then, may affect a mootness inquiry. This was demonstrated in a recent Supreme Court case in which the Court assessed whether a habeas corpus petitioner's "subsequent release caused the petition to be moot because it no longer presented a case or controversy under Article III." *Spencer v. Kemna*, 523 U.S. 1, 7, 140 L. Ed. 2d 43, 118 S. Ct. 978 (1998). The Court stated that "the parties must continue to have a 'personal stake in the outcome' of the lawsuit." *Ibid.* (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-78, 108 L. Ed. 2d 400, 110 S. Ct. 1249 (1990)). The Court made clear that, "this means that, *throughout the litigation*, the plaintiff 'must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision.'" *Ibid.* (quoting *Lewis*, 494 U.S. at 477) (emphasis added). In *Spencer*, the Supreme Court directly used elements of the standing inquiry to determine that the petitioner no longer had an injury in fact and that, therefore, his claim had became moot.

II

The court concludes that the NAACP has standing to sue on behalf of *only one* of its seven plaintiffs, Tomblin, because he satisfied all the necessary requirements for standing at the time this litigation commenced. The court fails to engage in a mootness inquiry, however. There are two ways in which Tomblin lost a personal interest in this litigation, causing his claim, and, therefore, the NAACP's claim, to be rendered moot.

The NAACP has asserted that it has associational standing to sue Parma. The court concludes that the NAACP had associational standing when it brought suit against Parma because Tomblin was a member of the NAACP at that time. *See Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977) ("an association has standing to bring suit on behalf of its members when . . . its members would otherwise have standing to sue in their own right"). Tomblin is no longer a member of the NAACP. Tomblin testified in his 1997 deposition that he was no longer a member of the NAACP and that he had ceased being a member in the past few years prior to 1997. He stated that he stopped being a member of the NAACP because, "I probably just shifted my intentions to other things." In order for this case to be justiciable, "the association must allege that its members, *or any one of them*, are suffering immediate or threatened injury as a result of a challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Warth v. Seldin*, 422 U.S. 490, 511, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975) (emphasis added). The NAACP is unable to demonstrate that any one of its members continues to have a personal interest in this litigation.[1] Since the NAACP is no longer representing interests of any specific members, its claims have become moot. *Cf. Hope, Inc. v. County of DuPage*, 738 F.2d 797,

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[1] The only plaintiff who was a member of the NAACP at the time the NAACP filed its complaint and who has continued to be a member of the NAACP throughout this litigation is Rhonda Crayton, who the court concedes cannot be relied upon by the NAACP to obtain standing since she cannot demonstrate that Parma's decision not to hire her was fairly traceable to her race. *See* Maj. Op. at n.19.

814 (7th Cir. 1984) ("The Supreme Court has *not* seen fit to extend representational capacity standing to entities other than associations which actually represent interests of parties whose affiliation with the representational litigant is that of membership . . . or substantial equivalent of membership.").

Not only is Tomblin no longer a member of the NAACP, but he no longer alleges an injury that can be redressed by a favorable judicial decision. *See Spencer*, 523 U.S. at 7. It is true that Tomblin maintains an interest in working for Parma, but his deposition testimony indicates that since the commencement of this litigation, any injury that he might have sufficiently alleged for standing purposes no longer exists. Tomblin admits that after his May 4, 1993 letter to Parma complaining that he was not notified of municipal police and fire examinations, he did receive a postcard informing him of the exam. In addition, Tomblin stated that after he received the postcard, "I just did not sit for the exam." Finally, Tomblin stated that "there was nothing else Parma could do" "other than the fact of informing me of the examination, lifting the residency requirement, having a validated test, putting a notification in the *Plain Dealer* or *Call & Post* saying that or [declaring] that the City of Parma does not discriminate against minorities, especially blacks, in the safety forces or civil service positions and hiring me . . . if I scored high enough with a validated test." All of the actions that Tomblin stated that Parma could do, Parma had done, either by the time Tomblin received the postcard notifying him of the next municipal police and fire examination or soon after. The only action Parma did not do - hiring Tomblin - is not because of any discrimination on Parma's part, but because Tomblin did not sit for the examination.

Tomblin admits that there was nothing else Parma could do to redress the injury he claimed to have suffered when he brought suit against Parma. Moreover, Tomblin seeks only future injunctive relief, not damages for past injuries he has suffered. Since there is no future injunctive relief that this court can give to Tomblin to redress his injuries, his claim has become moot. According to this court, "the test for mootness is whether the relief sought would, if granted, make a difference to the legal interests of the parties . . . ." *McPherson*, 119 F.3d at 458 (internal quotations omitted). Any future injunctive relief that this court could grant Tomblin would not make a difference to him since he has stated that Parma has done all it could for him.[2] *See Spencer*, 523 U.S. at 18 ("mootness, however it may have come about, simply deprives us of our power to act; there is

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[2] This case differs from *McPherson*, in which this court held that the fact the plaintiff had graduated from high school did not make a case challenging the Michigan High School Athletic Association's eight-semester eligibility rule moot. 119 F.3d at 459. The court ruled that the controversy remained alive because the district court had granted a preliminary injunction allowing McPherson to play high school basketball despite his ineligibility under the rule. The court ruled that if the association was able to have the injunction reversed on appeal, the legal interests of both McPherson and the association would be affected since McPherson's high school would have to forfeit any victories in games in which McPherson played and the association could vacate or strike the records of McPherson and his high school basketball team. *Id.* at 458-59. In this case, however, Tomblin's legal interests would not be affected by any action of this court since there is no more relief that Tomblin continues to seek.

nothing for us to remedy, even if we were disposed to do so").

The fact that the NAACP in general may still believe that Parma's recruitment and hiring practices are discriminatory does not prevent this case from becoming moot.[3] *See Sample v. Johnson*, 771 F.2d 1335, 1339 (9th Cir. 1985) ("That other persons may litigate a similar claim does not save a case from mootness."). None of the plaintiffs that the NAACP relied upon to achieve standing in this case continue to have a "personal stake" in the outcome of this litigation. *Warth*, 422 U.S. at 498.[4] The single plaintiff that

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[3] This is not to say that the NAACP would be prevented from bringing another complaint against Parma. *Cf. NAACP v. Town of Harrison*, 749 F. Supp. 1327 (D.N.J. 1990) (noting that NAACP's initial complaint was dismissed because the NAACP had not demonstrated that NAACP members would have standing if they had brought suit, but finding that standing deficiencies had been cured by new complaint brought by NAACP).

[4] It should also be noted that the NAACP did not seek to certify a class pursuant to Fed R. Civ. P. 23. If it had done so, and if Tomblin had been the class representative, it is likely that the NAACP's case could proceed even though Tomblin's claim had become moot. *See Sosna v. Iowa*, 419 U.S. 393, 397-403, 42 L. Ed. 2d 532, 95 S. Ct. 553 (1975). The Court in *Sosna* recognized that when the district court certified the class, "the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by [the class representative]." *Id.* at 399. The Court held that:

> There must not only be a named plaintiff who has such a case or controversy at the time the complaint is filed, and at the time the class action is certified by the District Court pursuant to Rule

the court relies upon in order to hold that the NAACP has standing, Tomblin, no longer has a personal stake in two ways: (1) he is no longer a member of the NAACP, and (2) he no longer alleges an injury that can be redressed by a favorable judicial decision.

I realize that this case has been litigated for over ten years. I also realize that the NAACP believes that, even with the changes made by the ~~City of~~ Parma to its municipal recruitment and hiring practices over these past ten years, the system is still discriminatory. However, neither the delay in this litigation nor the serious claims that the NAACP is bringing justify a departure from the fundamental requirement that a plaintiff must have a continuing interest in the ongoing litigation in order for this court to exercise the limited jurisdiction it is granted by the Constitution. *See Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70, 78 L. Ed. 2d 58, 104 S. Ct. 373 (1983) ("Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases and controversies."). This case is

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> 23, but there must be a live controversy at the time this Court reviews the case. . . . The controversy may exist, however, between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot.

Id. at 402. Since the NAACP did not seek to obtain class certification, the fact that a controversy may continue to exist between unnamed members of the NAACP and Parma does not save this case from becoming moot once the claims of the NAACP's named plaintiffs have become moot, as I believe they have.

moot because Tomblin - and, therefore, the NAACP - no longer have a continuing interest in this litigation. I therefore respectfully dissent.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:90-CV-1404

[Filed March 30, 1998]

Judge O'Malley

CLEVELAND BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, AND THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Plaintiffs,

v.

CITY OF PARMA, OHIO,

Defendant,

JUDGMENT ENTRY

For the reasons set forth in this Court's Memorandum and Order of this date, Parma's-motion for summary judgment (Dkt. #152) is **GRANTED** and the NAACP's

motion for summary judgment (Dkt. #155) is **DENIED**. Accordingly, this case is hereby **DISMISSED**.

IT IS SO ORDERED.

/s/_____

KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:90-CV-1404

[Filed, March 30, 1998]

Judge O'Malley

CLEVELAND BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, AND THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

Plaintiffs,

v.

CITY OF PARMA, OHIO,

Defendant.

MEMORANDUM & ORDER

Plaintiffs, the Cleveland and National Branches of the National Association for the Advancement of Colored People (collectively, the "NAACP"), bring this action against

defendant, the City of Parma ("Parma"), alleging that Parma discriminates against blacks in the hiring of municipal employees. The NAACP seeks prospective injunctive relief to eliminate Parma's allegedly discriminatory practices and their effects. Parma now moves for summary judgment on the NAACP's claims on the grounds that they are not justiciable, primarily asserting the NAACP lacks standing to assert the claims in its complaint and that subsequent events have rendered those claims moot (Dkt. #152). The NAACP also moves for summary judgment on the issue of disparate impact liability (Dkt. #155). For the reasons set forth below, Parma's motion for summary judgment is **GRANTED** and the NAACP's motion for summary judgment is **DENIED**.[1] Accordingly, this case is hereby **DISMISSED**.

I. Background

A. Procedural History

This action originally was filed on August 6, 1990, and was assigned to the late Judge Frank Battisti. The case was transferred to Judge Robert Krupansky in November of 1994, who was then acting as a District Judge by designation. The case ultimately was transferred to the undersigned in March of 1996.

There were several motions pending at the time the case was transferred to this Court. Those motions, some of

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[1] Parma also has filed three motions to strike various pleadings and affidavits submitted by the NAACP. Because this Court is granting Parma's motion for summary judgment, its motions to strike (dkt. ## 165, 170, 173) are **DENIED AS MOOT**.

which had been pending for more than four (4) years, included the following: (1) Parma's motion to dismiss (filed September, 1991); (2) the NAACP's motion for summary judgment on the issue of liability (filed November, 1991); (3) Parma's motion for summary judgment (filed December, 1991); (4) the NAACP's motion for leave to file an amended complaint (filed November, 1992); and (5) a motion by Artis Tomblin – one of the individuals on whose behalf the NAACP brought suit – to intervene as a plaintiff (filed February, 1995).[2]

At a case management conference held on April 15, 1996, the parties agreed that the motions needed to be updated, both factually and legally. Accordingly, the Court vacated all outstanding motions without prejudice to subsequent renewal. The parties requested that, before filing their renewed motions, they be given another opportunity to settle the case, and the Court granted this request, allowing them sixty (60) days to attempt to reach a compromise. At the same time, the Court established deadlines for additional discovery and the filing of renewed motions, in the event the settlement discussions failed to result in a resolution of the case.

In June, 1996, the Court again met with the parties. They asked for referral to mediation and an extension of all deadlines to allow for additional attempts to resolve the case. Consequently, all deadlines were extended and the parties were referred to mediation. At the request of the parties, the deadline for the completion of mediation was continued until

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[2] The Court denied Tomblin's motion to intervene in an order dated April 15, 1996.

January, 1997. The parties were unable to resolve their differences in mediation, however, and on January 29, 1997, the Court met with the parties to establish firm deadlines for the completion of discovery and the filing of renewed motions. Pursuant to those deadlines, Parma and the NAACP filed renewed motions for summary judgment in the summer of 1997. Both parties also filed reply and opposition briefs. Supplemental briefs containing later-decided authority were filed in November, 1997.[3]

B. Factual History

The NAACP, which has branches throughout the country, is a voluntary association devoted to eliminating discrimination and racial prejudice, improving the social and economic status of minority groups, and securing equal opportunities for minorities. The NAACP accomplishes these goals through political action, education, and litigation, and these efforts have resulted in several important advances in civil rights for minorities in general, and for blacks in particular. Though the NAACP seeks to better the lives of and opportunities for all minorities, membership in the NAACP is limited to only those individuals who formally join and pay annual dues to support the association's efforts.

Parma, located within ten (10) miles of Cleveland, is a mostly white community with a history of discriminating against blacks in housing. In 1973, the United States government brought a Fair Housing Act action against Parma. In U.S. v. City of Parma, 494 F. Supp. 1049 (N.D. Ohio

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[3] The NAACP never renewed its motion to file an amended complaint.

1980), Judge Battisti found that Parma discriminated against blacks in providing low and moderate income housing. A remedial order was issued, under which Parma was to take several affirmative steps to remedy its discriminatory practices and their effects, U.S. v. City. of Parma, 504 F. Supp. 913 (N.D. Ohio 1980), and that order was largely affirmed on appeal. U.S. v. City of Parma, 661 F.2d 562 (6th Cir. 1981) (affirming injunctive relief and reversing decision to appoint special master).

In November, 1996, following a motion by Parma for relief from the remedial order, the parties, after extensive negotiations, entered into an agreement to vacate Judge Battisti's order and redefine the City's continuing obligations. Under this agreement, approved by and embodied in an order of this Court, the parties acknowledged the many efforts Parma had made to comply with the 1980 order and set forth those actions the parties agreed were necessary to assure Parma's eventual transition to a fully open community. The November, 1996 agreement was significant in many respects. First it constituted a negotiated resolution of an emotionally charged, contentious civil rights case which had been pending for twenty-three years. Next, as the government attorneys explained when praising the settlement, in it the City agreed to take creative, affirmative steps to alter its racial composition, many of which may not have been available via court order. Finally, it included a recognition that many traditional methods for encouraging growth of the minority population in a community had not been successful in Parma, despite substantial efforts by Parma officials to comply with the obligations imposed upon the City by Judge Battisti.

This last fact was borne out by relevant statistics: Nearly ten (10) years after the remedial order was imposed, the racial composition of Parma's residents still had not changed significantly. As of 1990, less than one percent (1%) of Parma's residents were black. By comparison, Cuyahoga County– in which both Cleveland and Parma are located – had a black population of nearly twenty-five percent (25%). It was at that point, and against the background of a history of housing discrimination, that the NAACP filed a charge with the EEOC alleging that Parma discriminates against blacks in the recruitment and hiring for municipal jobs.

The NAACP's charge focused on the fact that, between 1976 and 1988, a Parma ordinance required that all municipal employees live in Parma.[4] It is that residency requirement, viewed in light of Parma's history of housing discrimination and resulting monochromatic racial makeup, which the NAACP asserted unfairly disadvantaged minorities in their quest for public employment.

The NAACP brought this attack on Parma's 1976 residency requirement even though Parma changed its

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[4] Specifically, the ordinance provided:

> No person shall be appointed or employed by the City of Parma unless such person is a bona fide resident of the City. All persons appointed and/or employed after the effective date of this Ordinance shall maintain their residency within the City of Parma during such employment.

Parma, Oh., Ordinance 223-76 (December 8, 1976) (amending Parma, Oh. Codified Ordinance § 173.05).

residency requirement in 1988 to a move-in requirement.[5] Thus, while the 1976 law made it clear that, as a practical matter, an applicant would not even be eligible for a job unless he or she lived in Parma, under the 1988 ordinance, a potential employee was given eighteen (18) months to move into Parma after hiring. In other words, residency was no longer a prerequisite to working for the City. It became, instead, a requirement for continued employment following an eighteen (18) month grace period.

Parma made additional changes to its recruitment practices and employment requirements in the mid-1990's.[6] Thus, in 1995, Parma eliminated residency as a formal

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[5] The 1988 ordinance stated:

> Any person who is appointed to or commences employment in a position with the City on or after the effective date of this section, shall, within eighteen (18) months of such event, become a permanent resident of the City. Failure to become a permanent resident within such time shall be grounds for dismissal from service with the City. Any person who is an employee or appointee of the City on the effective date of this section shall maintain his residency with the City, provided, however, that at any time after the fifth anniversary of any such appointment or commencement of employment with the City... the employee shall be permitted to reside within a municipality which abuts the City of Parma.

Parma, Oh., Ordinance 86-88 (June 13, 1988) (amending Parma, Oh. Codified Ordinance §173.05).

[6] It is likely that these changes were at least partially in response to this litigation.

employment consideration altogether. Instead, within eighteen (18) months of beginning employment with Parma, municipal employees were required to live within fifteen (15) miles of the city. Parma, Oh., Ordinance 299-95 (November 10, 1995) (amending Parma, Oh., Codified Ordinance §173.05). This radius encompassed all of the City of Cleveland and virtually all of Cuyahoga County. In 1996, Parma amended the ordinance again, this time by expanding the fifteen (15) mile requirement to twenty-two (22) miles. Parma, Oh., Ordinance 190-96 (July 3, 1996) (amending Parma, Oh., Codified Ordinance §173.05). This twenty-two (22) mile radius encompassed not only all of Cuyahoga County, but portions of surrounding counties as well.

Sometime before 1996, Parma also began advertising in the *Plain Dealer, The Call & Post* (which has a predominately black readership), and The *Sun* newspapers to announce job openings and scheduled civil service examinations and continues regularly to engage in such advertising whenever examinations are being offered. Parma also posts job openings for law enforcement positions at Cuyahoga Community College, Cleveland State University, Lorain Community College, and Lakeland Community College, and distributes brochures about working for the Parma Police Department which are specifically directed at minorities. In addition, Parma sends postcards which notify the recipient of upcoming civil service examinations to anyone who requests to be placed on its mailing list. Finally, at the behest of the NAACP, Parma has hired a consulting firm (chosen by the NAACP) to create a new written test for Parma's police officer examination and has announced its intent to do the same for its fire fighter examination.

The procedure for obtaining employment with Parma is as follows. Any individual interested in a municipal job must first submit an application. The applicant then is notified of the dates on which the civil service test (if required) is being given. For positions other than that of fire fighter or police officer, the applicant is at that point placed on an eligibility list in ranked order. For the fire fighter and police officer positions, if the applicant passes the written test, he or she must then take and pass a physical agility test. If the applicant passes that test, he or she is then placed on an eligibility list in ranked order. The applicant will then be subject to an interview, background check, and polygraph examination before being hired.

C. The EEOC Charge and Complaint

In its EEOC charge, the NAACP acknowledged the change effected by the 1988 residency requirement, but pointed out that, as late as 1989, Parma continued to make hiring decisions on the basis of pre-1988 eligibility lists, when residency was still a pre-hiring requirement for all city positions.[7] The NAACP contended, accordingly, that non-

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[7] In its EEOC charge, the NAACP makes the following allegations regarding the residency requirement:

> Parma has discriminated against blacks in recruiting for civil service jobs by directing its recruitment towards residents of Parma and by stating in announcements of examination that applicants for the positions must move into Parma. Before November, 1988, applicants were required to move in upon appointment, but since that date, they are allowed eighteen months to move in. Parma has discriminated against blacks in

residents effectively were excluded from consideration, despite the change in the law. Moreover, contended the NAACP, up until that time, Parma limited its recruitment efforts to word-of-mouth and postings in Parma's City Hall, neither of which was (for obvious reasons) an effective means of communicating job openings to blacks who lived outside of Parma. Based on these facts, the NAACP charged that "Parma discriminates in hiring by refusing to recruit, consider, select and employ blacks on the same basis as whites." (EEOC Charge para. 4). Notably, the EEOC Charge contained no explicit reference to Parma's testing procedures or any discriminatory impact they might have. All allegations centered on the residency requirement and recruitment techniques that served to limit recruitment to residents of Parma, which (allegedly) effectively limited employment opportunities to whites since they comprised more than ninety-nine percent (99%) of Parma's population at the time. The charge was spurred by and premised upon the interaction between Parma's historically discriminatory housing policies and hiring laws and practices which effectively reserved city jobs for city residents.

> recruiting for non-civil service jobs by limiting recruitment for most positions to word of mouth and by directing recruitment to residents of Parma and towards friends and relatives of current employees. Although Parma changed its residence requirement for civil service employees in 1988, it continues to use eligibility lists created, and applications for non-civil service jobs collected when the prior residence requirement was in effect.

(EEOC Charge para. 3).

After receiving its right-to-sue letter at the end of May, 1990, the NAACP timely filed this action on August 6, 1990. The complaint was filed on behalf of several individuals whom the NAACP identified as its members; these included Kenneth Berts, Wendy Childress, Arthur Collins, Ronda Crayton, Clarence Johnson, Maurice McIntosh, Leon Pettigrew, and Lenora Saleem. In the amended complaint, however, the NAACP identifies a different group of "members" on whose behalf it brings the instant claims and upon whom it bases its standing to raise those claims. The NAACP makes a point of emphasizing that, because it never renewed its motion for leave to file an amended complaint,[8] it is the original complaint with which the Court should be concerned and that Parma's reliance on the amended complaint in its summary judgment motion is misplaced.

The NAACP's response (as well as the briefs filed on behalf of its own summary judgment motion), however, focuses on the "members" identified in its amended complaint, and ignores four of the eight individuals identified in the original complaint. The individuals discussed by both the NAACP and Parma in the latest round of briefing are

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[8] In its brief in opposition to Parma's motion for summary judgment, the NAACP states that the amended complaint "was never filed, because Judge Battisti did not act upon it, and because this Court vacated all motions pending in 1996 after the time the case was reassigned." (Pl. Br. in Opp. at 8 n.1). What the NAACP forgets is that there was nothing standing in the way of it renewing its motion to file an amended complaint. It was not this Court's order vacating all outstanding motions (which both parties agreed was appropriate in the circumstances) that resulted in the amended complaint not being filed, but the NAACP's own failure to submit a renewed motion to file an amended complaint.

Marlon Allen, Wendy Childress, Arthur Collins, Ronda Crayton, Maurice McIntosh, and Art Tomblin. Because both Parma and the NAACP focus on the injuries allegedly suffered by these individuals in their briefs, and not on those identified in the original complaint, the Court also will focus on these individuals in its analysis of the NAACP's standing. The Court notes, however, that were it to focus solely on the original complaint in determining whether standing exists, it would be constrained to conclude that the complaint contains inadequate allegations to support the standing of the NAACP to prosecute this case. See, e.g., Newark Branch, NAACP v. Town of Harrison, 907 F.2d 1408, 1415-16 (3d Cir. 1990).[9]

D. Individuals Identified as Members by the NAACP

As the NAACP's standing in this case is dependent on the standing of its members or any one of them to bring this action on his or her own behalf, the Court now outlines the factual underpinnings of each of the putative members' claims.

1. Arthur Collins.

Collins is not now and never has been a member of the NAACP. Collins works as a snowplow driver for the City of Cleveland, a job which he has held since 1990, and is a member of a truck driver's union. In 1990, Collins was interested in becoming a police officer or truck driver for Parma; however, according to his 1990 deposition, he never

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[9] The sole purpose of the amended complaint appears to have been to cure the original complaint's failures with respect to establishing the NAACP's standing.

wrote to or called Parma to inquire about possible job opportunities. Currently, the only position he is potentially interested in is that of truck driver, which is, like his present job, a union position. Since 1990, Collins has made no inquiries regarding employment opportunities in Parma, or any other municipality, and has not asked the truck drivers' union whether any such positions are available. In fact, according to his most recent deposition testimony, Collins has no particular desire to obtain a job with the City of Parma.

2. Maurice McIntosh.

Although McIntosh was a member of the NAACP for one year in the early 1980's while he was in college, he has not been a member of the NAACP since. Since 1990, McIntosh has worked for the Cuyahoga county Youth Development Center in Hudson. McIntosh inquired about employment with the City of Parma in December, 1990 after seeing a newspaper advertisement in either the *Plain Dealer* or *The Sun*. McIntosh went to City Hall and submitted an employment application. He subsequently received at least one notification of a firefighter's examination that was scheduled for April, 1993. Postcards notifying him of police officer examinations also were mailed, but he does not remember receiving them. He never sat for any of these examinations and has not made any further inquiries about obtaining employment with the City of Parma since 1990.

In his deposition, McIntosh stated that he no longer is interested in a police or fireman's position with Parma, because of his age (thirty-six). While he is not actively seeking employment, and apparently is content with his present job, he stated that he would accept a position with

Parma in some other capacity if he were presented with the appropriate opportunity.

3. Rodney Blanton.

Blanton was not a member of the NAACP at the time this action was filed and is not now a member of the NAACP, although he was a member for one year from 1995 to 1996. According to the NAACP, he has authorized it to represent his interests in the case.

At the time the parties filed their briefs, Blanton worked as a corrections officer for the Ohio Department of Rehabilitation and Corrections. Prior to this position, Blanton worked simultaneously in part time positions at the Cleveland Marriot in Beachwood, and at UPS. In 1989, he applied for a police officer position with Parma. He passed both the written examination and the physical agility test and was placed on the list of eligibles (with a rank of 18). He was removed from the list of eligibles, however, because of his responses to a polygraph examination,[10]

In 1997, just prior to his second deposition, Blanton was offered a job with the Cuyahoga County Sheriff's Office. He intends to accept this position, and has indicated that he no longer is interested in working for Parma as a police officer.

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[10] Blanton did not file an EEOC charge regarding his removal from the list and the NAACP concedes that certain of Blanton's responses during his first polygraph examination were untruthful.

4. Marion Allen.

Allen is a longtime member of the NAACP. In 1990, he was interested in working as a firefighter for Parma. In addition, he expressed "slight" interest in working as a police officer for the City. However, Allen never inquired, formally or informally, about what he needed to do to obtain a job with Parma. He, thus, never applied for and was never rejected for any position with the City.

Allen has since moved out-of-state. He currently lives in Atlanta, Georgia, and has represented that he has no intention of returning to Ohio or of obtaining employment with Parma.

5. Wendy Childress.

Childress is not currently a member of the NAACP. In her most recent deposition, she states that she does not believe that she ever has been a member of the NAACP. The NAACP represents that she was a member of the organization in 1990, but the record to which it purports to point for support was not included with its brief or in the appendix submitted with that brief. The Court nonetheless accepts the NAACP's representation that Childress was a member of the organization in 1990 for purposes of the instant motion.

Childress currently lives in the Cleveland Metropolitan area and works for the American Red Cross as an office assistant. In 1990, she stated that she was interested in a position with the police department or some type of clerical position with Parma, but she never contacted Parma about employment opportunities or the steps she needed to take to

apply for such opportunities. Since that time, she has not contacted Parma about obtaining employment or taken any other affirmative steps toward getting a job with Parma. In her most recent deposition, Childress said she would not want to work in Parma if she were required to live there as well. Even though she is now aware that there is no longer a residency requirement, Childress maintains that she currently has no present intent or desire to work for Parma.

6. Ronda Crayton.

With the exception of Allen, Crayton is the only individual identified by the NAACP who has been a member of the NAACP throughout the course of this litigation. Crayton currently works as an investigator with the Cuyahoga County Department of Children and Family Services, and also works part time as a security officer for the City of Cleveland and as a substitute teacher for the Cleveland Public Schools.

In late 1989, Crayton applied for a position with the Parma Police Department. She passed the written examination, but failed the agility portion of the test, and, thus, was not placed on the list of eligibles. Crayton believes she was failed because of her gender. The NAACP makes the same contention,[11] Crayton has not sought to obtain a position

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[11] The NAACP also contends that, by discriminating against Crayton because of her gender, Parma engaged in racial discrimination as well. This is so, the NAACP submits, because African-American women apply for law enforcement positions more often than white women. Thus, the NAACP asserts all gender discrimination relating to law enforcement positions also can be characterized as race discrimination.

with the Parma Police Department since and has no present intent to do so at any time in the near future, though she insists that she would accept a position as a Parma police officer if she were presented with the opportunity.

7. Artis Tomblin.

Tomblin was a member of the NAACP in 1990 at the time the suit was filed, but he has not been a dues-paying member of the organization for several years. He currently works as the Executive Director for a non-profit organization he founded in 1992.

In February, 1990, Tomblin submitted an employment application with Parma and requested that he be contacted regarding future employment opportunities, including any examinations for police and fire positions. Although Parma insists it sent Tomblin postcards notifying him of all police and fire examinations, Tomblin recalls having received only one such postcard. Nonetheless, he chose not to sit for the examination, because, in his view, it would have been fruitless to take the test in light of the residency requirement.

Tomblin no longer has an interest in working as a fireman or policeman in Parma, and has taken no affirmative steps since that time to obtain a position with Parma. Tomblin says that he would "consider" working in a civil service position only "if pay was comparable and maybe if the residency requirement goes on for all civil service positions." (Def. Ex. P at 33). Although Tomblin did state that he would give such an opportunity "serious consideration," id. at 34, he stressed that he "couldn't say honestly that [he] would accept [the position]." Id. at 33.

II. The Claims Properly Before This Court

As an initial matter, the Court must first set forth which claims properly are before this Court, and which are not. Properly before this Court are the NAACP's claims regarding Parma's residency requirement in both its 1976 (to the extent and only to the extent eligibility lists continued to be constructed from applicants who sought employment prior to the 1988 change) and 1988 incarnations. In addition, the NAACP's claims regarding Parma's reliance on word-of-mouth and City Hall postings to recruit applicants for jobs are properly before this Court. These claims were clearly identified in the EEOC charge.

The NAACP's more recent challenge to Parma's police, fire, and other examinations, however, is not properly before this Court. This claim was neither expressly made in the EEOC charge, nor could it fairly be said to have "grown out of" that charge. The EEOC charge read as a whole clearly focuses on the residency requirement and other recruitment practices that had the effect of favoring Parma residents either prior to 1990, or at any point thereafter. That charge cannot fairly be characterized as raising a challenge to the testing procedures employed in Parma. Consequently, it did not put the EEOC or defendant Parma on notice that such a practice was being challenged, and did not allow a meaningful opportunity for the accomplishment of Title VII's mediation goals.[12] Although the charge does contain a catchall allegation

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[12] In this regard, it is telling that, when the NAACP began to complain about Parma's testing procedures, which it appears did not occur until sometime during the settlement negotiations in 1996, Parma indicated a willingness to evaluate and change its procedures

which states that "Parma discriminates in hiring by refusing to recruit, consider, select and employ blacks on the same basis as whites," (EEOC Charge para. 4), "such vague, general allegations" are "incapable of inviting a meaningful EEOC response." Butts v. City of New York Dept of Housing, 990 F.2d 1397, 1403 (2d Cir. 1993). See also Marshall v. Federal Express Corp., 130 F.3d 1095, 1098 (D.C.Cir. 1997) ("A vague or circumscribed EEOC charge will not satisfy the exhaustion requirement for claims it does not fairly embrace."); Rush v. McDonald's Corp., 966 F.2d 1104, 1110 (7th Cir. 1992) (holding that a party "may not complain to the EEOC of only certain instances of discrimination, and then seek judicial relief for different instances of discrimination"); Schnellbaecher v. Baskin Clothing Co., 887 F.2d 124, 127 (7th Cir. 1989) (stating that "allowing a complaint to encompass allegations outside the ambit of the predicate EEOC charge would circumvent the EEOC's investigatory and conciliatory role, as well as deprive the charged party with notice of the charge, as surely as would an initial failure to file a timely EEOC charge"). "Naturally every detail of the eventual complaint need not be presaged in the EEOC filing, but the substance of [a Title VII] claim...must fall within the scope of "'the administrative investigation that can reasonably be expected to follow the charge of discrimination.'" Marshall, 130 F.3d at 1098 (quoting Park v. Howard University, 71 F.3d 904, 907-09 (D.C. Cir. 1995)).

The EEOC charge was drafted by a representative of the NAACP, who, we may presume, was familiar with the

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with the input of the NAACP and/or with the help of consultants recommended by the NAACP.

practice and the specificity required in such charges. While an inartfully drafted EEOC charge may be forgiven – at least to some degree – when filed by a plaintiff without the benefit of counsel, less leniency is required when a charge is filed on behalf of a national organization which regularly engages in race discrimination litigation and has years of experience and scores of talented attorneys available to assist in drafting the charge. The recruitment and testing claims are vastly different claims, require separate proofs, and, it would seem, the resolution of one claim has no impact on and is unrelated to the outcome of the other. There is nothing on the face of the charge that would lead the EEOC to investigate Parma's testing procedures, and there is nothing that would lead Parma to believe that such procedures were being challenged.

The NAACP's complaint similarly contains no express challenge to Parma's testing procedures. The factual allegations of the complaint focus on the percentage of blacks in Parma's available labor pool and the 1976 and 1988 incarnations of Parma's residency (or move-in) requirements. There is no factual allegation concerning Parma's testing procedures. In paragraph fourteen (14) of the complaint, the NAACP alleges that Parma's employment practices are discriminatory in the following ways:

> a. By failing or refusing to recruit and hire blacks on the same basis as whites;
>
> b. By following recruitment practices which advise residents of Parma, and friends and relatives of incumbent employees of Parma, of employment opportunities in the municipal employment of Parma without advising black

persons in the relevant labor market of such opportunities;

c. By following recruitment practices which have the effect of deterring non-residents, including almost all blacks, from applying for employment opportunities with Parma;

d. By traditionally requiring that appointments be limited to residents of Parma, and by requiting that employees of defendant establish and maintain their residence in Parma, a requirement that was intended to exclude and does disproportionately exclude blacks from municipal employment;

e. By failing and refusing to take the appropriate recruitment measures to correct the effects of the defendant's past discriminatory policies and practices;

f. By limiting hiring, until very recently, to lists of eligibles created when appointments were limited to residents of Parma;

g. Upon information and belief, by using unvalidated selection procedures that have the effect of disproportionately excluding from employment those black applicants who do obtain timely information regarding employment opportunities and who are not deterred by the discriminatory practices of defendant.

(Complaint para. 14). Paragraph 14(g) is the only allegation which arguably can be read as asserting a challenge to Parma's testing procedures, but even it lacks enough specificity to have put Parma on notice that testing was an issue in this case. Indeed, in November, 1990, Parma, unsure of exactly what claims were being asserted, filed a motion for a more definite statement (Dkt. #13). In response to that motion, the NAACP insisted that its "complaint ... [was] not vague or ambiguous," because it "assert[ed] two kinds of claims for relief." (Memorandum of Pl. in Opp. To Def. Mot. for a More Definite Statement at 2) (Dkt. #14). The "two kinds of relief" identified by the NAACP were (1) a claim of purposeful discrimination based on the combination of Parma's "practice of excluding blacks from housing opportunities," and its residency requirement and recruiting techniques, id., and (2) a claim of disparate impact based on Parma's "practice of limiting appointments to residents." Id. at 15.[13]

Thus, not only did the NAACP fail to assert a discernable claim against Parma's testing practices in either its EEOC charge or its complaint (or even in the amended complaint it sought leave to file), it affirmatively represented that it was seeking relief only as to Parma's residency requirement, recruiting procedures which favored residents, and their continuing effects, under theories of discriminatory treatment and discriminatory impact. After making such representations, upon which both Parma and this Court

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[13] The NAACP made similar representations as to the scope of its claims in a Motion to Compel filed on April 10, 1991. (Pl. Mot. To Compel at 3-4) (Dkt. #33).

reasonably have relied throughout this litigation, the NAACP cannot now be heard to assert claims concerning Parma's testing practices.

Because it cannot fairly be said that this claim grew out of or is related to the central claims raised in the EEOC charge so as to put either the EEOC or Parma on notice that the testing procedures were under attack, and because of the NAACP's own affirmative representations that it was asserting only claims based on the residency requirement and recruiting practices of Parma, the NAACP's challenge to Parma's written and physical agility tests (a challenge not fully developed even in its current briefs) is not properly before this Court.[14] It must be raised, if at all, in a separate action after Title VII's investigatory and mediation goals have been satisfied.[15]

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[14] Indeed, it is not dear whether the tests currently in use were used when the complaint in this case was filed or when any of the individuals the NAACP identifies considered employment with Parma.

[15] This case is distinguishable from United States v. City of Northlake, 942 F.2d 1164 (7th Cir. 1991). In Northlake, the Civil Rights Division of the Department of Justice brought a Title VII action against (among other Illinois cities) the City of Northlake. The United States alleged that Northlake failed to recruit and hire blacks on the same basis as whites, and expressly challenged Northlake's residency requirement on both disparate treatment and disparate impact grounds. Several years after the litigation began, a consent decree was entered.

When the United States later claimed the City was in violation of its obligations under the consent decree because it continued to use oral interview procedures, the Seventh Circuit allowed that challenge. The Court noted that, while "the complaint

III. Mootness

Under Article III of the Constitution, this Court may decide only "actual, ongoing controversies." Honig v. Doe, 484 U.S. 305, 317 (1988). See also Allen v. Wright, 468

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specifically identified the residency requirement, [it] also alleged that the defendant discriminated against blacks in both its failure or refusal to adopt objective[,] valid and non-discriminatory municipal hiring procedures...and its failure to adopt and implement a vigorous recruitment program designed to attract qualified blacks for employment by the City." Id. (citations to the record omitted). The Seventh Circuit did not premise its reversal, however, on the complaint's vague and perfunctory mention of a testing claim. Its holding was, rather, premised on the contents of the consent decree and policy considerations peculiar to the issuance of that decree. The Court reasoned that to require the United States to "proceed by way of a 'fresh' complaint... [would] undermine[] the purpose of a consent decree in the first instance -- namely, to avoid protracted litigation by entering into a court-supervised agreement that resolves the dispute to the satisfaction of all parties concerned and guarantees the viability of the agreement under the watchful eye of the judge whose signature appears at the end of the document." Id. This, in turn, would discourage civil rights from entering into such decrees. Id.

Here, because no consent decree has been entered, the practical and policy concerns that were so significant to the outcome of Northlake are not implicated. In fact, allowing the NAACP to include a challenge to Parma's testing practices at this late date presents its own policy concerns; it would frustrate the mediation policy which animates Title VII's requirement that plaintiffs file an EEOC charge before filing suit.

U.S. 737, 750 (1984); Kentucky Right to Life, Inc. v. Terry, 108 F.3d 637, 644 (6th Cir.), cert. denied, 118 S.Ct. 162 (1997). "The mootness doctrine...demands a live case-or-controversy when a federal court decides a case." Terry, 108 F.3d at 644. See also National Black Police Association v. Dist. of Columbia, 108 F.3d 346, 349 (D.C. Cir. 1997) (stating that "a live controversy must exist at all stages of review") (citing Lewis v. Continental Bank Corp., 494 U.S. 472, 477 (1990); Preiser v. Newkirk, 422 U.S. 395, 401 (1975)). Accordingly, "[e]ven where litigation poses a live controversy when filed,... a federal court [must] refrain from deciding it if 'events have so transpired that the decision will neither presently affect the parties' rights nor have a more-than-speculative chance of affecting them in the future.'" Clark v. United States, 915 F.2d 699, 701 (D.C. Cir. 1990) (en banc) (quoting Transwestern Pipeline Co. v. FERC, 897 F.2d 570, 575 (D.C. Cir. 1990)). "Legislative repeal or amendment of a challenged statute" or ordinance during the course of litigation "usually eliminates this requisite case-or-controversy." Terry, 108 F.3d at 644. As the Seventh Circuit has stated, "[v]ictory in the legislative forum makes judicial proceedings moot." Miller v. Benson, 68 F.3d 163, 164 (7th Cir. 1995).

Parma's City Council has totally eliminated residency as a requirement for anyone seeking employment with the City. Thus, the challenged ordinance has effectively been repealed, and the primary obstacle to minority recruitment and hiring by Parma has been removed. In addition, Parma now advertises in three newspapers, one of which has a predominately black readership, regularly posts job openings at several local colleges which have significant black student bodies (using brochures directed at recruiting blacks), and

routinely mails postcards notifying anyone who requests to be informed about upcoming civil service, police officer, and fire fighter examinations. As a result, Parma no longer confines its recruitment efforts to postings at City Hall and word-of-mouth, which favored whites over blacks. Parma's elimination of the residency requirement and its affirmative – and active – efforts to recruit individuals, including minorities, outside of Parma, have given the NAACP what they sought to achieve by this action.

Where a political body voluntarily repeals a challenged ordinance or statute, or discontinues a challenged practice, however, two requirements must be satisfied before the case will be considered moot. County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979). First, there must be no reasonable expectation that the challenged ordinance or practice will be reenacted or reinstated. Id. Second, "interim relief or events [must] have completely or irrevocably eradicated the effects of the alleged violation." Id. This is the so called "voluntary cessation" doctrine.

Parma has given the NAACP what it sought, there is no reasonable expectation that Parma will reenact the challenged ordinance or practices, and Parma's repeal of the residency requirement and other affirmative actions have eradicated the effects of what properly has been challenged in this case. "A determination by this Court of the legal issues tendered by the parties is no longer necessary to compel" the relief sought by the NAACP or to halt the allegedly discriminatory practices it challenged. DeFunis v. Odegaard, 416 U.S. 312, 317 (1974). Accordingly, this case is now moot. See id.; Terry, 108 F.3d at 645; Miller, 68 F.3d at 164 ("The state legislature gave plaintiffs what they sought, and

this case is therefore moot."). The additional relief sought by the NAACP, radio advertisements and statements in newspaper advertisements which specifically encourage minority applicants, is too slight in comparison to the rest of the relief already obtained to justify this Court's continued jurisdiction and involvement in this case. S-1 v. Spangler, 832 F.2d 294, 297 (4th Cir. 1987) (holding that, where the specific relief sought "no longer has sufficient utility to justify decision of [the] case on the merits" the case is moot).

There is no indication that Parma will reenact the earlier ordinance or take any other action toward reinstating the residency requirement, and, in the absence of such an indication, the voluntary cessation doctrine does not prevent a finding of mootness. See Terry, 108 F.3d at 645 ("This exception properly applies only when a recalcitrant legislature clearly intends to reenact the challenged regulation.) (emphasis added); National Black Police Association, 108 F.3d at 349 ("[T]he mere power to reenact a challenged law is not a sufficient basis on which a court can conclude that a reasonable expectation of recurrence exists. Rather, there must be evidence indicating that the challenged law likely will be reenacted."). Indeed, all indications point in the opposite direction. Parma has settled the housing discrimination case and has taken a number of affirmative steps, a number of which were not even contemplated by the remedial order, in the housing case, to make itself a more open community. Parma has steadily liberalized the residency requirement over the past ten (10) years to the point that it essentially no longer exists at all, and employees are free to live anywhere in Cuyahoga county, and may even live in surrounding counties. In addition, Parma has taken several other steps to improve its recruitment efforts and make its practices more satisfactory to

minorities, by, for instance, volunteering to use whatever police officer examination the NAACP wants and representing that it would do the same for the fire fighter examination.[16] Finally, it should not be forgotten that Parma is under the watchful eye of the public and press as it continues in its nearly thirty year effort to rid itself of the stigma of being a racially intolerant community. It is, therefore, not likely to retreat from its actions and representations. Based on these factors, the rationale behind the voluntary cessation doctrine simply does not apply. Accordingly, the voluntary cessation doctrine does not prevent a finding of mootness. See Terry, 108 F.3d at 645 (finding mootness where legislature repealed offensive legislation and its prior conduct showed that it would not likely reenact the legislation).

The actions taken by Parma have also completely and irrevocably eradicated the effects of the challenged violation, and there is, thus, no issue left for this Court to resolve.

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[16] Given these promises, even if the Court were to conclude that the NAACP properly had challenged the City's testing procedure in this case, the Court likely would find that challenge moot as well. See Lee v. Biloxi School Dist., 963 F.2d 837, 839 (5th Cir. 1992) (holding that defendants' express commitment to provide relief requested, where defendants' recent behavior indicated strongly that promise would be upheld, mooted case). Cf. Defunis, 416 U.S. at 317 (finding mootness where defendant promised not to interfere with plaintiff's status as a student, regardless of outcome of case on merits); Committee in Solidarity v. Sessions, 929 F.2d 742, 744-45 (D.C. Cir. 1991) (stating that "'it has been the settled practice' to accept [a defendant's] representations in determining whether a case presents a live controversy") (quoting Defunis at 317).

"Where intervening legislation has settled a controversy involving only injunctive or declaratory relief, the controversy has become moot." In re Bunker Ltd. Partnership, 820 F.2d 308, 311 (9th Cir. 1987). Parma no longer makes hiring decisions – for any position – using eligibility lists that were prepared when either the residency or move-in requirements were in place. Thus, the continuing discriminatory effect of the residency requirement, or of eligibility lists which were limited to Parma residents, has been eliminated, and, in fact, was eliminated at least by 1996 if not by 1990, and a "continuing violation" theory is not available to the NAACP. To the extent there are additional lingering effects of the earlier residency requirement, those effects are mooted both by the recruitment efforts that Parma directs toward nonresidents, as evidenced by its advertisements in The *Plain Dealer, The Sun, and The Call & Post,* and its promotions at local colleges, and by its proactive housing measures. That the NAACP would like Parma to advertise in a different medium – without even demonstrating that it will reach more potential applicants – or include an express statement in its advertising indicating its desire to hire minorities, does not serve to maintain a case or controversy. Where the challenged action has stopped and remedial steps have been put in place to eliminate its effects, the controversy is dead. See Spangler, 832 F.2d at 297. If a plaintiff could breathe life into any case in which the challenged statute has been repealed and substantial steps already undertaken to remedy the lingering effects of that statute simply by conjuring up additional forms of relief –whose potential for success beyond that afforded by the relief already provided is purely speculative – plaintiffs could keep cases alive indefinitely. The case or controversy requirement of Article III of the United States Constitution is not that malleable.

United States v. City of Warren, 759 F. Supp. 355, 365 (E.D. Mich. 1991), upon which the NAACP relies, does not counsel otherwise. There, the district court concluded, in an action involving a challenge to a residency requirement, that the case was not moot even though the city had taken several remedial steps to correct its effects (including, inter alia, elimination of the residency requirement and discontinuation of lists developed while the old residency requirement was in effect, advertising in black newspapers and on local colleges, etc.). The Court premised its conclusion, however, on the fact that in that case both injunctive relief and monetary damages for the victims of Warren's discriminatory practices were being sought. Thus, because "Warren ha[d] never taken a single step to attempt to identify victims of that discriminatory practice, much less provide full, make-whole relief to them," the Court concluded that the city's acts did not "completely and irrevocably eradicate the effects of the alleged violations." Id. at 365-66.[17] Here, by contrast, money damages have not been sought; the NAACP seeks only injunctive relief. Yet, there is no meaningful injunction this Court could enter, and certainly none which could give the NAACP more than the City has given it voluntarily. Thus, unlike the situation in Warren, where money damages were available as a remedy for past wrongs, there is no additional substantial relief that this Court

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[17] In Warren, the district court ultimately identified only one victim of that city's discriminatory practices. As to that single victim the court concluded that an award of compensatory damages was appropriate. Those issues are not presented by this case.

could provide which would remedy the injuries suffered by the members on whose behalf the NAACP brings this suit.[18]

If this were 1978, rather than 1998, a different result may well be warranted. A pre-employment residency requirement in an all-white community with a history of intolerance most certainly would be discriminatory. The status quo in 1998, however, does not mirror the status quo twenty years earlier.[19] In the intervening years since the late 1970's and early 1980's, Parma's laws and practices have changed to such a degree that the NAACP is left complaining about what was wrong in the past, rather than what is wrong today. In a case seeking prospective injunctive relief, such complaints have no vitality. Accordingly, this case is moot.

IV. The NAACP's Standing

Even if the case as a whole were not moot, this case would not be justiciable for an additional reason: the NAACP lacks standing. Because none of the individuals identified as members of the organization have standing in their own right, the NAACP cannot have standing to sue on their behalf.

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[18] The injury the NAACP complains of relates only to the residency requirement and the fact that none of its identified members lived in Parma or desired to live in what they perceived to be a racially intolerant community. None of the identified "members," it would appear, would benefit from radio advertisements or additional statements in newspapers, the marginal additional benefit the NAACP claims it wants from this Court.

[19] Indeed, the status quo in 1990, when this action was filed, was not the same as that in 1978, or at any time between 1976 and 1988.

A. General Principles

"The doctrine of standing serves both as a constitutional limitation on judicial power, deriving from the 'case or controversy' requirement in Article III ... and as a self-imposed prudential doctrine intended to monitor judicial review of public acts." Lugo v. Miller, 640 F.2d 823, 827 (6th Cir. 1981). The standing inquiry requires the Court to determine whether a particular controversy "warrants [the] invocation of federal court jurisdiction and...justif[ies] exercise of the court's remedial powers" on behalf of a particular plaintiff. Warth v. Seldin, 422 U.S. 490, 498-99 (1975) (citation omitted).

Standing is dependent upon a tripartite showing. First, the plaintiff must have suffered a "distinct and palpable injury," id. at 501, or, if injunctive relief is being sought – as is the case here – the plaintiff must show a likelihood of future injury. See City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983). The Supreme Court recently has elaborated on the type of showing required to establish the likelihood of future injury, stating that, "to maintain [a] claim for forward-looking relief," the plaintiff must show "'an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.'" Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 211 (1995) (quoting Lujan v. Defenders of Wildlife, 504 U.S. *555,* 560 (1992)). See also Brunet v. City of Columbus, 1 F.3d 390, 396 (6th Cir. 1993) ("If the injury is not actual, but imminent, the plaintiff cannot simply allege possible injury at some indefinite, future time.") (citing Whitmore v. Arkansas, 495 U.S. 149, 158 (1990)). Significantly, "the fact of past injury, 'while presumably affording [the plaintiff] standing to

claim damages..., does nothing to establish a real and immediate threat that he would again 'suffer similar injury in the future.'" Id. at 210-11 (quoting Lyons, 461 U.S. at 105).[20] Second, that injury must "bear[] a 'fairly traceable connection' to the challenged government action." Lugo, 640 F.2d at 827 (quoting Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 72 (1978)). Third, it must be likely "that the injury will be redressed by a favorable decision, by which [it is meant] that the 'prospect of obtaining relief from the injury as a result of a favorable ruling' is not 'too speculative.'" Florida General Contractors v. City of Jacksonville, 508 U.S. 656, 663 (1993) (quoting Allen v. Wright, 468 U.S. 737, 752 (1984)). See also Steel Company v. Citizens for a Better Environment, __U.S.___, 118 S.Ct. 1003, 1017 n.5 (1998) (noting that the reason for the redressability requirement is to ensure that "a plaintiff 'personally would benefit in a tangible way from the court's intervention '") (citation omitted); Linton v. Tenn. Comm'r of Health and Environment, 973 F.2d 1311, 1316 (6th Cir. 1992). As the party invoking this Court's jurisdiction, the NAACP bears the burden of establishing standing. See Brunet, 1 F.3d at 396.

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[20] Accordingly, "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief...if unaccompanied by any continuing, present adverse effects." O'Shea v. Littleton, 414 U.S. 488, 495-96 (1974). Rather, past exposure to illegal conduct merely serves as evidence of "whether there is a real and immediate threat of repeated injury." Id.

B. Associational Standing

The NAACP brings this action for injuries allegedly suffered - or likely to be suffered in the future - by its members, rather than for any injuries it has itself suffered. "Even in the absence of injury to itself, an association may have standing solely as the representative of its members." Warth v. Seldin, 422 U.S. 490, 511 (1975). "The possibility of such representational standing" does not, however, obviate the need for a "case or controversy" within the contemplation of Article III. Id. (citing Sierra Club v. Morton, 405 U.S. 727, 738 (1972)).

An association has standing to sue on behalf of its members only if the following three requirements have been satisfied: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted, nor the relief requested, requires the participation of individual members in the lawsuit." Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977). See also National Rifle Association of America v. Magan, 132 F.2d 272, 294 (6th Cir. 1997); Greater Cincinnati Coalition for the Homeless v. City of Cincinnati, 56 F.3d 710, 717 (6th Cir. 1995).[21] The dispute in this case revolves around the first prong. Parma contends that the NAACP lacks standing because none of the individual members upon whom

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[21] Associational standing is sometimes characterized as an exception to the prudential bar against third-party standing. See, e.g., Erwin Chemerinsky, Federal Jurisdiction §2.3.4 at 82 n. 152 (2d ed. 1994).

it purports to base this action has standing to sue in his or her own right. The Court agrees.

C. Analysis

1. The Distinction Between Past and Future Injuries for Purposes of Achieving Standing to Obtain Injunctive Relief

The first step in determining standing in this case is to ascertain precisely what injury the putative members assert they have suffered. As the NAACP stresses, its claim is not that the putative members were denied any particular job. Rather, it is that they were denied the opportunity to compete for jobs on an equal basis with whites. Thus, the NAACP is correct that it need not demonstrate that any of its putative members would actually have obtained or will obtain a job with the City of Parma to establish standing. See Adarand, 515 U.S. at 211 ("The aggrieved party 'need not allege that he would have obtained the benefit but for the barrier in order to establish standing.'") (quoting General Contractors, 508 U.S. at 666). See also Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 281 (1978) (stating that, "even if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing").

That it is unnecessary for the NAACP to show that one of its members would have gotten a job but for the alleged discriminatory practice does not mean that it is also unnecessary for the NAACP to demonstrate that injury was "imminent." The NAACP appears to believe that General Contractors dispensed with Lujan's imminence requirement in

cases where injunctive relief is sought.[22] The case did no such thing.

General Contractors (and Bakke before it) simply liberalized the definition of an injury-in-fact. It did not eliminate it. To show an injury in fact in a case where the injury sought to be remedied is prospective (as in this case), a plaintiff still must show that he or she will be exposed to the allegedly injurious behavior. It is not enough, in other words, for a plaintiff to say the injurious practice exists; he or she must show that there is a substantial likelihood that it will be applied to him or her. If this was not clear from General Contractor's insistence that a plaintiff show that he or she is "able and ready" to bid on a project (or apply for a job), Adarand, which was decided after General Contractor and relied on it, makes it abundantly clear. In Adarand, the Court acknowledged that the plaintiff did not have to show that it would be the low bidder on a government contract in order to establish standing. 515 U.S. at 211. The Court did not stop there, as the NAACP asks this Court to do, however. Instead, the Court queried whether "the future use of subcontractor

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[22] For instance, in the NAACP's brief in support of its motion for summary judgment, it boldly states that "whether or not [its putative members] are not presently interested in employment, plaintiffs still have standing." (Pl. Br. in Supp. of Mot. for Summary Judgment at 24). In addition, in its brief in opposition to Parma's motion for summary judgment, the NAACP recites a narrow interpretation of the General Contractor rule: "Where an organization challenges institutional barriers that make it more difficult for members of one racial group to obtain a benefit than members of other groups [sic] an association has standing if one or more members has applied or sought to apply." (Pl. Br. in Opp. to Def. Mot. for Summary Judgment at 27).

compensation clauses will cause Adarand 'imminent' injury." Id. Thus, the Court held that, to establish standing, the plaintiffmust "show[] that sometime in the relatively near future it will bid on another government contract that offers financial incentives to a prime contractor for hiring disadvantaged subcontractors." Id. To make this determination, the Court examined whether the plaintiff had bid on such contracts in the past, its intent to bid on them in the future, the likelihood that it would do so, and whether it would do so soon or farther into the future.[23]

Thus, the NAACP misses the point when it contends that whether any of its "members" intends to pursue a job in Parma in the near future is irrelevant. In fact, given that the remedy sought in this case is (and can only be) prospective and equitable in nature, that is the issue in this case. The standing of the individual members of the NAACP, and that of the NAACP, turns on precisely that question, since the only injury which this Court possibly could remedy in this case is a future injury; thus, contrary to the NAACP's view, the past injuries allegedly suffered by the individual members are largely irrelevant in this case. See Adarand, 515 U.S. at 210-11 ("[T]he fact of past injury, 'while presumably affording [the plaintiff] standing to claim damages ..., does

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[23] The Adarand Court concluded that, "[b]ecause the evidence in this case indicates that the [agency] is likely to let contracts involving guardrail work that contain a subcontractor compensation clause at least once per year in Colorado, that Adarand is very likely to bid on each such contract, and that Adarand often must compete for such contracts against small disadvantaged businesses, we are satisfied that Adarand has standing to bring this lawsuit." 515 U.S. at 212 (emphasis added).

nothing to establish a real and immediate threat that he would again' suffer similar injury in the future.'") (quoting Lyons, 461 U.S. at 105). Accordingly, the injuries allegedly suffered by the individuals in this case in the past, to which the NAACP devotes virtually all of its briefing, would have afforded the "members" standing to assert damages claims on their own behalf, but those past injuries, by themselves, do nothing to give the NAACP standing to assert claims for prospective equitable relief.[24] Id. An organization cannot bootstrap standing to pursue injunctive relief on behalf of its members on the fact that its members may have standing (or may have had standing in the past) to bring damages actions for past injuries. See Lyons, 461 U.S. at 105-06; Tucker v. Phyfer, 819 F.2d 1030, 1034 (11th Cir. 1987) (stating that a "live controversy concerning " a claim for which the plaintiff was seeking monetary damages "could not perform 'double duty' simultaneously providing [the plaintiff] with standing to prosecute both his claim for damages and his claim for injunctive relief"). In other words, "Article III's command that a plaintiff have standing to assert his claim clearly mandates more than that the plaintiff and the defendant have a dispute over something; it means that the plaintiff and the defendant must have a justiciable dispute over the specific claim the plaintiff asserts." Tucker, 819 F.2d at 1034. Consequently, at least one of the "members" must be able to show that he or she will be or presently is being denied the

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[24] They do, of course, supply relevant evidence – depending on how recently efforts were made and their extent – on the issue of whether a member has a sincere interest in employment with Parma. See Adarand, 515 U.S. at 212; General Contractors, 508 U.S. at 656.

opportunity to obtain employment with the City of Parma "in the relatively near future." Adarand, 515 U.S. at 211.

The Court realizes that where, as here, a case has been aging for several years, it would be unduly harsh, unfair, and unrealistic to require that the individuals upon whose behalf an organization brings an action forgo all other opportunities in order to demonstrate genuine interest in a position. Nonetheless, the Court must have some assurance that there is a "case or controversy" for which federal intervention is warranted. At any rate, it is not necessary to impose such a draconian requirement, any more than General Contractors required that member contractors forgo bidding on other projects pending the outcome of the litigation. Thus, the fact that all of the members identified here are now employed in other jobs does not defeat the possibility that they may show an injury-in-fact.

At least one member must, however, show that he or she still seeks to work for Parma, and has taken some action toward that end (which need not entail the actual submission of an application) that shows a present intent, as distinct from a mere passive interest. To ascertain whether this intent exists, the Court, following General Contractors and Adarand, considers the members' most recent statements regarding their interest in obtaining employment with Parma, any past efforts made to obtain such employment, the recency of those efforts, and the extent of those efforts. As the Supreme Court stated in Lujan, so called "'some day' intentions - without any description of concrete plans, or indeed even any specification of when the some day will be - do not support a finding of the 'actual or imminent' injury that our cases require." Lujan, 504 U.S. at 564. Thus, vague, hedging expressions of a mere

interest in obtaining a position with Parma at some point in the future are insufficient to create an injury-in-fact under Article III. See Id. (stating that the members' mere "'inten[t]'" to expose themselves to illegal conduct was "simply not enough").

2. The Standing of Individual "Members" of the NAACP

With these principles in mind, the Court proceeds to a determination of whether any of the individuals on whose behalf the NAACP brought this suit have standing, and, consequently, whether the NAACP has standing to assert claims on their behalf. The Court concludes that they do not, and that the NAACP thus lacks standing in this case.

a. The Standing of Collins and McIntosh

Two of the individuals identified by the NAACP as putative members are not really members of the NAACP at all and were not members at any time during this litigation. These individuals are Arthur Collins and Maurice McIntosh. Collins has never been an NAACP member. Although McIntosh was a member at one point in the early 1980's, that one time membership is insufficient to make him a member of the NAACP for purposes of this litigation because it did not overlap at all with any period during which this litigation has been pending. Because these individuals do not satisfy even the minimal requirement of membership, the NAACP cannot premise its own standing on them.

b. Ronda Crayton's Standing

Ronda Crayton lacks standing for several reasons. First, she fails to assert an imminent injury as required under Lujan and its progeny. She did apply and take the requisite tests for a police officer position, which shows that she was interested in the position in the past. Further, she has stated that she is still interested in a position with the Parma Police Department and would accept such a position if it were offered to her. Since 1990, however, Crayton has not inquired about obtaining a position with the Parma Police or taken any other steps which would indicate a sincere desire or genuine interest in obtaining such a position. While there certainly may be a "case or controversy" regarding a damages action for her alleged past injury, the lack of any indication of an imminent injury is insufficient to create a case or controversy for purposes of injunctive relief and fails to show that she is "able and ready" to seek employment with Parma in the future. General Contractors, 508 U.S. at 666. See also Adarand, 515 U.S. at 211; Lujan, 504 U.S. at 555; Warth, 422 U.S. at 516.

Even assuming that Crayton were able to establish the existence of an imminent injury-in-fact, Crayton would clearly fail the causation and redressability elements of the standing inquiry. Her claim is premised solely on her failure of the agility portion of the police examination. She contends that her failure was a product of gender discrimination. Although the NAACP attempts to bootstrap a claim for race discrimination onto this explicit gender discrimination claim, the Court does not find that effort credible, and views it as an attempt to create a justiciable case where none exists. Because the claim available to Crayton and that sought by the NAACP

are not even the same, it is difficult to see a causal relationship between the alleged race discrimination by Parma in the recruitment of employees and the disparate impact its agility test has on females.

Further, the specific relief requested in this case – the elimination of the residency requirement (which has already been accomplished) and affirmative steps to increase recruitment of blacks – would not redress Crayton for the injury she allegedly suffered. Where the specific relief requested is not likely to – or, as in this case, simply will not – redress the injury asserted, the redressability prong has not been satisfied. See Steel Company, __U.S. at __, 118 S.Ct. at 1019 ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement."); See also Allen v. Wright, 468 U.S. 737, 754-55 (1984). The relief requested in this case focuses on residency requirements and hiring policies which disproportionately favor residents. That relief would not benefit Crayton, however. To redress Crayton's alleged injury, this Court would have to require Parma to create and implement an agility test which does not disproportionately fail females. Quite obviously, that relief is aimed at remedying the effects of gender discrimination, not race discrimination, and would not be achieved by an order invalidating residency requirements or resident-friendly policies. Thus, given the claims properly before this Court, it would be virtually impossible for this Court to remedy Crayton's claim.

Even under the NAACP's unusual theory that gender discrimination equals race discrimination in the law enforcement field, any incidental benefit to African-American

females would be too attenuated. Such accidental relief cannot provide standing where it otherwise would not exist. Because the remedy is not aimed at redressing the race discrimination claim which serves as the predicate claim for this case, but some other injury that is merely tangential to this case, the potential for redressability is purely speculative. Cf. Allen, 468 U.S. at 752 (holding that redressability requires that the "prospect of obtaining relief from the injury as a result of a favorable ruling" must not be "too speculative"). For any one of the above reasons, Crayton lacks standing and the NAACP cannot obtain standing on her behalf.

c. Artis Tomblin's Standing

Artis Tomblin also lacks standing. Like Crayton, there is no question that he expressed an interest in obtaining employment with Parma in and before 1990, and even as late as 1993. His interest, however, has waned over the years and lacks the concreteness necessary for a "case or controversy" as that term is contemplated within the meaning of Article III. In fact, to the extent Tomblin is interested at all in obtaining a job in Parma, it more closely resembles the passive "some day" interest rejected in Lujan and Warth, not the current, active interest held to be sufficient in General Contractors and Adarand.

Even if this Court were to credit Tomblin's contention that he did not follow through on any past opportunities because he thought it would be "futile" or "fruitless" to apply, his future plans, as expressed in his own words, are insufficient to generate an "imminent" injury under Lujan. "The fact that [Parma] may have been utilizing employment practices which had a discriminatory impact on blacks does

not, in and of itself, mean for purposes of Title VII that every black who may [be] generally interested" in working for Parma is "thereby injured by [Parma's allegedly discriminatory] practices." Town of Harrison, 907 F.2d at 1416 (emphasis added). Rather, a "nonapplicant must show that he was [or will be] a potential victim of unlawful discrimination." Teamsters v. United States, 431 U.S. 324, 367 (1977). Tomblin has shown, at most, that he is "generally interested" in working for Parma, which is the type of "abstract injury" which is insufficient to establish an injury-in-fact. See O'Shea, 414 U.S. at 494. Consequently, "the NAACP, as an association, cannot achieve standing[,] despite its longstanding and sincere interest in rectifying such perceived discrimination." Harrison, 907 F.2d at 1416 (citations omitted). See also General Contractors, 508 U.S. at 666; Adarand, 515 U.S. at 211; Lujan, 504 U.S. at 555; Warth, 422 U.S. at 516.

Moreover, the obstacle which Tomblin identifies as having prevented him from applying for a job, and which made such application fruitless, the residency requirement, has been eliminated as a condition of employment. Throughout his deposition, this is the one consideration that made him believe it would be futile to apply. That obstacle having been eliminated, and there being no other significant obstacle identified by Tomblin that would cause him to believe that it would be futile even to attempt to get a job with Parma, Tomblin has not made the requisite showing that would cause this Court to interpret his failure to take any affirmative steps toward employment with Parma in the last three to four years as anything other than a lack of genuine interest in the position. Cf. Harrison, 907 F.2d at 1416. Indeed, Tomblin

does not state in his most recent deposition that he still thinks it would be fruitless to apply.

The elimination of the residency requirement serves to redress the very injury about which Tomblin complained, and it is difficult to comprehend how any additional relief (radio advertisements or affirmative statements on employment forms) would in any way redress that injury. Tomblin already is aware of how to obtain a job in Parma, and is aware that Parma advertises for positions in the *Plain Dealer* and other Cleveland metropolitan area newspapers, including one that has a primarily black readership.[25] Thus, the redressability prong of the standing test has not been satisfied. See Spangler, 832 F.2d at 297 (holding that case was moot where "specific relief sought...no longer ha[d] sufficient utility to justify decision of th[e] case on the merits"). Cf. Steel Company, 1998 WL 88044 at 13 ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement.").

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[25] The only additional relief which the NAACP seeks in this case is (1) an order that Parma include a statement in its newspaper advertisements for jobs that states that "minorities are especially encouraged" to apply, which it included in its 1991 advertisements; and (2) an order requiring Parma to advertise on WZAK, where it advertises housing opportunities, which has a predominately black audience. In his 1997 deposition, however, Tomblin testified that he does not listen to WZAK. Thus, the specific relief requested does not appear designed to benefit Tomblin -- or any of the putative members -- in any material way.

d. Rodney Blanton's Standing

Like Tomblin and Crayton, Blanton lacks standing both because he has not shown that he is likely to suffer an imminent injury, and because the relief requested by the NAACP is not likely to redress his injuries. As already mentioned, Blanton was offered a job with the Cuyahoga County Sheriff's Office, he intends to accept that position, and he thus has no present concrete plans or desires to accept a position with the Parma Police Department. While Blanton may have or may have had a damages action against Parma for damages based on his allegation that similarly-situated (those that made false statements or had criminal backgrounds) white candidates were treated differently than he, that past injury does not generate a present case or controversy for purposes of an action for injunctive relief. See General Contractors, 508 U.S. at 666. See also Adarand, 515 U.S. at 211; Lujan, 504 U.S. at 555; Warth, 422 U.S. at 516.

Moreover, the specific relief requested in this action – elimination of the residency requirement and recruitment efforts designed to reach minorities – will do nothing to remedy the injury allegedly suffered by Blanton. Since he applied for a police officer position and took the written and physical tests required to obtain that position, it is obvious that neither the residency requirement nor the recruitment practices about which the NAACP complains in this case served (or now serve) as obstacles or deterrents to his attempt to get a job with the City. It was only the City's refusal to retain Blanton on its eligibility lists, based on his polygraph responses, that limited his ability to compete for a law enforcement position. Thus, the link between the relief requested in this action and the injury suffered by Blanton is

not simply speculative, it is nonexistent and so does not generate a justiciable case. See General Contractors, 508 U.S. at 663 (holding that it must be likely "that the injury will be redressed by a favorable decision, by which [it is meant] that the 'prospect of obtaining relief from the injury as a result of a favorable ruling' is not 'too speculative'") (citation omitted). "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." Steel Company, ___U.S. at ___, 118 S.Ct. At 1019. See also Allen, 468 U.S. at 754-55. Accordingly, Blanton lacks standing in this case.

e. Wendy Childress' Standing

Like Crayton, Tomblin, and Blanton. Childress also has expressed no concrete plans to apply for or otherwise inquire about working for Parma. Unlike Crayton and Tomblin, Childress has never contacted or taken even the smallest step to determine what she would have to do to obtain employment with Parma. In her most recent deposition, moreover, Childress was quite clear that she has absolutely no interest in applying for employment with Parma, and she maintains this view even though she now is aware that the principal obstacle identified by her – the residency requirement – has been eliminated: The Court fails to comprehend how the NAACP can claim standing on the basis of an individual who has affirmatively stated that she has no intent – not even a "some day" intent– to expose herself to illegal contact, and, thus, is not in danger of suffering an

injury-in-fact. Accordingly, the NAACP cannot base its standing on Childress.[26]

3. The Failure of Tomblin, Childress and Blanton to Maintain Membership in the NAACP

There may be an even more basic barrier to the NAACP's attempt to premise its own standing on Tomblin, Childress and Blanton: the fact that none of those individuals has maintained membership in the NAACP throughout this litigation, or even a significant portion of it. Thus, the question arises whether an organization can premise standing on that of an individual who, for whatever reason, decides to discontinue his or her membership before the completion of litigation.

Parma briefly raises this point in its brief, but does not argue it at any length and cites no cases in support. In

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[26] The same is true for Marlon Allen. Allen now lives and works in Atlanta, Georgia, and informed Parma's counsel that he has no interest of returning to the Cleveland area or working for Parma. Based on this representation, Parma did not depose him in its latest round of depositions. The NAACP does not dispute this, only makes perfunctory mention of him in its brief in opposition to Parma's motion for summary judgment, and bases its case for Allen's standing on the fact of alleged past discrimination. As was true for Crayton, Tomblin, and Childress, past injury is relevant only insofar as it indicates a present intent to seek employment with Parma. It is not sufficient in itself. Because Allen does not seek employment with Parma, and because he now lives and works in another state nearly seven hundred (700) miles away, any potential injury to Allen is purely speculative. Accordingly, he lacks standing as well.

similarly pithy fashion, the NAACP responds simply by stating that standing is determined at the time the lawsuit is filed, and the fact of an individual's continued membership beyond that point is irrelevant, again with no support.[27] While the issue has not been squarely addressed by the Sixth Circuit, or by any court for that matter, it would seem that, in order for an organization to maintain organizational standing, the putative member upon whom it bases that standing must maintain his or her membership throughout at least a substantial portion of the litigation; erstwhile membership is not enough. Indeed, this is the only approach that is faithful to the rationale behind allowing associational standing in the first instance and that avoids the prohibition against third-party standing.

According to the Sixth Circuit, "[a] plaintiff must maintain standing throughout all stages of his litigation." City Communications, Inc. v. City of Detroit, 888 F.2d 1081, 1086 (6th Cir. 1989) (citations omitted). "Therefore, a plaintiff's standing is evaluated at the time it is challenged." Id. (citations omitted).[28]

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[27] Blanton was not even a member of the NAACP when the action was filed. Because he was a member, albeit briefly so, during the cause of the litigation, the Court considered his individual standing and its possible effect on that of the NAACP.

[28] City Communications acknowledged its apparently inconsistent holding in an earlier case, Senter v. General Motors Corp., 532 F.2d 511,520 (6th Cir. 1976), where the Court held that "[s]tanding is determined as of the date the suit is filed." The Sixth Circuit distinguished Senter, however, on the grounds that it "involved a Title VII class action and the appropriateness of the plaintiff as the named representative - specific issues inapplicable

Associational standing is an exception to the general bar against third-party standing. To allow an organization to assert claims on behalf of individuals who may once have been but are no longer members, or are only members fleetingly during the litigation, would be to allow an end-run around the bar against third-party standing. At the risk of mixing a metaphor, the exception would swallow the role. The Court agrees that, "[a]lthough the NAACP Branches have formal memberships and collect annual dues from the members, their efforts are on behalf of all black persons and they undertake to assist black persons claiming to be victims of discrimination whether or not they are formal members of

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to this case." City Communications, 888 F.2d at 1086.

This case also is distinguishable from Senter. While this case also involves Title VII, it does not involve a class action. Moreover, Senter was concerned with the issue of whether a subsequent offer of a promotion by an employer, where the claim was that the employer had denied promotions for discriminatory reasons in the past, mooted the named representative's claim (and that of the class) for damages. In such a case, it is easy to see that the subsequent action does not erase the fact of past injury for which damages are the only appropriate remedy. Here, by contrast, the claim is for prospective injunctive relief, and, in such cases, where the challenged activity ceases or the defendant does what the plaintiff requests, the plaintiff has achieved all that is possible in the litigation, and there is, thus, no longer any reason for continued court intervention. See Steel Company, ___U.S. at ___, 118 S.Ct. at 1019. In addition, the Court in Senter seemed to be concerned with the possibility that the employer might revoke the promotion or rescind the offer after the litigation concluded, a concern that, for a number of reasons, is not present here. See the Court's discussion of the "voluntary cessation" doctrine in Part III supra.

the NAACP." Town of Harrison, 749 F. Supp. at 1332. That fact, however, does not mean that the NAACP can assert claims in federal court on the basis of any minority injured by discrimination, any more than an environmental group can assert claims on behalf of a non-member simply because they share the same laudable goal of protecting the environment. As the Supreme Court held in Sierra Club v. Morton, "[a] mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself to [confer standing]," 405 U.S. 727, 739 (1972), even if it happens to be brought on behalf of an individual who would have standing to sue on her own behalf. See Health Research Group v. Kennedy, 82 F.R.D. 21, 25-26 (D.C.Cir. 1979).

Similarly, even though it is obvious that the NAACP shares with minorities in general – indeed, with all reasonable persons, regardless of race – a commitment and desire to end racial discrimination in general, that does not give it license to litigate claims on the basis of particular wrongs suffered by individual black persons, unless there is "something more" connecting that individual person with the NAACP than shared interests and a fleeting membership in the organization. Cf. Kennedy, 82 F.R.D. at 25. As Judge Sirica stated so well in Kennedy, "if the existence of cognizable injury, in and of itself, were sufficient to satisfy the Article III requirement, then any association or, for that matter, any individual, could gain standing simply by presenting the court with the case or controversy of any unrelated third party." Id. "Surely," observes Judge Sirica, "something more is required and must be found in the special relationship between an association and its members." Id. It certainly would stand to reason that a minority who has been the victim of discrimination is not

likely to object to the NAACP litigating on his behalf, and, indeed, their interests usually can be said, as a matter of common sense, to coincide. A shared interest, however, has never been the test for associational standing or, for that matter, for third party standing in general. See Sierra Club, 405 U.S. at 739. Indeed, if it were, the Court would have come to a much different conclusion in Sierra Club v. Morton.

Although actual and continuous membership (or its functional equivalent, see, e.g., Hunt) in an organization resembles the antediluvian formality of a wax seal in cases where it is obvious that the erstwhile member and the organization's interests are aligned, or at least are not divergent, it does provide some assurance – without the need for a time-consuming and detailed inquiry by the Court -that there is a sufficient nexus between the individual and the organization and an alignment of their particular interests in the litigation, such that the normal prohibition against raising the claims of third parties should be relaxed. See Kennedy, 82 F.R.D. at 26 ("So long as the courts insist on some sort of substantial nexus between the injured party and the organizational plaintiff– a nexus normally to be provided by actual membership or its functional equivalent measured in terms of control – it can reasonably be presumed that, in effect, it is the injured party who is himself seeking review.") (emphasis in original). The associational standing exception is premised on the assumption that the individual member has some degree of control and influence over the goals which the organization pursues on his or her behalf and the manner in which it pursues them, by voting or otherwise, and that the individual also does something to support that organization in its efforts, either financially (in the form of dues) or

otherwise. See Hunt, 432 U.S. at 344-45 (noting the following as "indicia of membership": "[t]hey alone elect the members of the Commission; they alone may serve on the Commission; they alone finance its activities, including the costs of this lawsuit") (emphasis added); Kennedy, 82 F.R.D. at 25-26. When an individual ceases to be a member of that organization - or its functional equivalent - he or she obviously ceases to retain any control over the organization or influence in its practices; moreover, because that individual no longer provides financial assistance (or its equivalent in volunteer labor), he or she does not have a stake in the enterprise and shows an indifference to its efforts, even if they might, in the abstract, share the same ultimate goals. Thus, the rationale for allowing associational standing in the first place disappears, and, in a case like this, the Court is presented with a case of third-party standing and nothing more.

To a certain extent, of course, the aggrieved individual serves merely as the vehicle through which the organization accomplishes its objectives. In other words, their continued involvement in the litigation is not necessary for the organization to achieve its goals - indeed, if the individual's participation were necessary, the organization would lack standing under the third prong of the test set forth in Hunt. Nonetheless, because membership indicates that the individual upon whose behalf the suit is being prosecuted has some level of control over the organization, it is fair to assume that that individual will maintain some influence over the course of the litigation as well, and that he can, to some degree at least, ensure that the litigation focuses on his injuries and will remedy them (or at least will not lose site of them). The Court realizes that, in this case, there is no evidence that any of the

identified members object to the way in which this suit is being prosecuted. In fact, in his deposition, Tomblin made a point of emphasizing that his lapse in membership was not due to his disagreement with the organization or its policies.

As explained above, however, whether the individual and the organization share the same goals and ideals is not the test for associational standing. Formal or functional control is the test, and that is what is lacking here. The fact remains that there is no indication that any of the individuals identified has any of the indicia of control which the functional test in Hunt requires. See Hunt, 432 at 345. This Court could not carve out an exception in this case without also emasculating the bar against third party standing and the rule announced by the Supreme Court in Hunt.[29] Thus, contrary to the NAACP's claim that membership at the inception of or sometime during the lawsuit is sufficient, it would seem that substantially continuous membership in the organization during the course of the litigation is necessary to ensure that the individual maintains some level of control over both the organization and the prosecution of the lawsuit which is, ostensibly at least, supposed to be on his behalf. The erstwhile memberships of Blanton, Tomblin and Childress, consequently, do not suffice.[30]

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[29] The NAACP has not argued or demonstrated that any of the other exceptions to the bar on third party standing applies, and, after consulting the relevant law, this Court could find none either.

[30] This case illustrates in a fairly concrete manner the importance of the control rationale and the necessity for at least some level of sustained membership in actions brought for injunctive relief by organizations where standing is based on that of individual members of the organization. Parma has characterized

V. Conclusion

Accordingly, because (1) all claims for relief properly asserted in this action are moot and (2) the NAACP lacks standing to bring claims on behalf of the named plaintiffs, Parma's motion for summary judgment is **GRANTED**. The NAACP's motion for summary judgment is **DENIED**, because the merits of this case are not justiciable. In addition, Parma's motions to strike all are **DENIED** as moot. This case is **DISMISSED**.

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the NAACP's approach to this litigation as a "moving target" strategy. That is, whenever Parma voluntarily gives the NAACP the relief it seeks, Parma claims the NAACP adds additional claims and seeks additional relief to prolong the life of this lawsuit. These claims are further and further divorced from the injuries allegedly suffered by the individuals who suffered them and from the allegations and concerns which prompted this action. Presumably, if the NAACP were representing the interests of an individual who actually had a voice in the way the NAACP has approached this litigation (aside from Crayton, whose claim from the beginning lacked any relationship to the claims beng made in this action), he or she would seek to focus the NAACP on his or her actual injuries, rather than on hypothetical injuries unrelated to those about which the individuals in this case initially complained. See, e.g., In re Air Crash Disaster at Detroit Metropolitan Airport, 737 F. Supp. 399, 403 (E.D. Mich. 1989) (stating that bar on third party standing "assures the court that the issues before it will be concrete and sharply presented") (citing Baker v. Carr, 369 U.S. 186, 204 (1962).

IT IS SO ORDERED.

/s/_____
Kathleen McDonald O'Malley
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CASE NO. 1:90-CV-1404

[Filed March 22, 1999]

Judge O'Malley

CLEVELAND BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, AND THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,	)
Plaintiffs,	)
v.	)
CITY OF PARMA, OHIO,	)
Defendant.	)

On March 30, 1998, this Court entered an Order granting defendant City of Parma's motion for summary judgment and denying the plaintiff NAACP's cross-motion for summary judgment. Specifically, the Court determined that

> because (1) all claims for relief properly asserted in this action are moot and (2) the NAACP lacks standing to bring claims on behalf of the named plaintiffs, Parma's motion for summary judgment is **GRANTED**. The NAACP's motion for summary judgment is **DENIED**, because the merits of this case are not justiciable.

Order at 45 (Mar. 30, 1998) (emphasis in original). After the Court entered this Order and dismissed the case, the NAACP filed a "motion to reconsider and alter the findings of fact, conclusions of law and judgment of March 30, 1998" (docket no. 179). For the reasons stated below, that motion is **DENIED**.

I.

Although the caption of the NAACP's motion suggests it wants the Court to review virtually every aspect of its March 30, 1998 Order ("Final Order"), the motion actually seeks to obtain "clarification specifying that plaintiffs sufficiently established standing to bring the action as an initial matter so that the issue will not be res judicata on the collateral fee petition." Motion at 17. Put more bluntly, the NAACP seeks a ruling on "reconsideration" that it is "entitled to an award of attorney's fees as the prevailing party, at least through the date the case became moot." Id. at 1.

In its Final Order, the Court noted that, "[a]ccording to the Sixth Circuit, '[a] plaintiff must maintain standing throughout all stages of his litigation. Therefore, a plaintiff's standing is evaluated at the time it is challenged.'" Final

Order at 42 (citing City Communications, Inc. v. City of Detroit, 888 F.2d 1081, 1086 (6th Cir. 1989)).[1] The Court then concluded that, as of the time Parma made its standing challenge in its motion for summary judgment, the NAACP did not have standing. Id. at 28-44. Accordingly, the Court dismissed the case.[2]

With its motion for reconsideration, the NAACP essentially asserts that, even though it may not have had standing as of the time Parma challenged standing, it did have standing "from the time [it] filed suit at least through 1995 when Parma eliminated the move in residence requirement." Motion at 7. The NAACP then argues that, because it had standing for at least some period of time during the course of this litigation, the Court should allow it to show, through a collateral fee petition, that it "is entitled to attorney's fees incurred up to the time at which it lost standing." Powder River Basin Resource Council v. Babbitt, 54 F.3d 1477, 1485 (10th Cir. 1995) (finding plaintiffs who loose standing may still be entitled to an award of attorneys fees incurred prior to loss of standing).

The Court is not without some sympathy for the NAACP's position. When the Court issued its Final Order, this case had been pending for almost eight years and the litigants had had three different judges assigned to the case.

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[1] See also Powder River Basin Resource Council v. Babbitt, 54 F.3d 1477, 1485 (10th Cir. 1995) (concluding that "plaintiff originally had standing but lost it") (citing City Communications and Gollust v. Mendell, 501 U.S. 116 (1991)).

[2] The Court also concluded that the case had become moot. Final Order at 20-25.

During the pendency of the litigation, Parma revised its residency requirement numerous times, ultimately abandoning it completely for all practical purposes. See Final Order at 5-6 (setting out Parma's several revisions to its residency requirement statute). It was Parma's residency requirement which was the focus of the NAACP's complaint, and this Court has concluded that "[i]t is likely that the[] changes [made by Parma to its residency requirement] were at least partially in response to this litigation." Id. at 6 n.6. Thus, it is not unreasonable to conclude that the NAACP's filing of this lawsuit ultimately had the practical effect of securing the very relief the NAACP initially sought to obtain.[3]

The question of whether the NAACP is entitled to attorney's fees, however, is not properly made in the context of a motion for reconsideration. As the Sixth Circuit Court of Appeals has recently stated, "motions to reconsider [are] nowadays correctly styled either motions for new trial or motions to alter or amend judgment" brought pursuant to Fed. R. Civ. P. 59. Feathers v. Chevron, U.S.A., Inc., 141 F.3d 264, 268 (6th Cir. 1998).[4] Further, "[m]otions under Rule

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[3] As noted in the Court's Final Order, the NAACP revised its informal demands upon Parma several times throughout the litigation, particularly in the months after this action was transferred to the undersigned. The NAACP's later demands do not change the fact, however, that it was the residency requirement that was the focus of the EEOC charge, the original complaint, and the amended complaint.

[4] Motions filed pursuant to Rule 59 must "be filed no later than 10 days after entry of judgment." Fed. R. Civ. P. 59(b). If a "motion to reconsider" is "not filed within the mandatory 10-day period, it is appropriate for a court to consider the motion as a

59(e) must either clearly establish a manifest error of law or must present newly discovered evidence." Sault Ste. Marie Tribe of Chippewa, Indians v. Engler, 146 F.3d 367, 374 (6th Cir. 1998) (citations omitted). See also Hutchinson v. Staton, 994 F.2d 1076, 1081 (4th Cir. 1993) ("courts interpreting Rule 59(e) have recognized three grounds for amending an earlier judgment: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at trial; or (3) to correct a clear error of law or prevent manifest injustice").

The NAACP, however, does not assert in its motion that there has been any change in controlling law, or that it has unearthed any heretofore-unavailable new evidence, or that the Court made any clear error of law, or that there exists any manifest injustice. Rather, the sole issue raised is the propriety of an attorney fee award. Essentially, the NAACP is asking the Court to amend its judgment by adding an advisory opinion regarding its right to a post-judgment award of attorney's fees. The Court must deny the NAACP's motion for reconsideration simply because it is not directed at or connected to (except tangentially) any critical element of the Court's dispositive judgment.

The Court explicitly notes, however, that its denial of the NAACP' s motion for reconsideration is without prejudice to any post-judgment motion the NAACP may file regarding the propriety of an attorney fee award. Any such motion, of course, will have to address the legal question - which

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motion pursuant to Rule 60 for relief from judgment." Feathers, 141 F.3d at 268. In this case, the NAACP filed its motion for reconsideration within the 10-day period.

remains undecided and does not depend in any way on any sympathies the Court may have - of whether the NAACP, even though it did not have standing as of the time standing was challenged, is still entitled to attorney's fees for some or all of its efforts to change Parma's policies.[5]

Regarding the filing of any such post-judgment motion, the Court earlier granted the parties' joint motion to extend the deadline for filing a fee petition (see docket no. 178). The Court now further extends that deadline. The Court believes that the Sixth Circuit, on appeal, may well shed light on the concept of standing and address the point at which standing is to be determined in a case, such as this one, where the plaintiff solely seeks prospective injunctive relief pursuant to federal-law claims. If the Sixth Circuit agrees with the NAACP that this Court's standing analysis is erroneous and "confuses the question of standing with the question of mootness," motion at 8, there likely will be no need to further parse the question of standing. Thus, the Court believes it

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[5] One Circuit Court has indicated (in considering the request of a proposed intervenor) that the propriety of an attorney's fee award may not be dependant upon a finding of Article III standing. Shaw v. Hunt, 154 F.3d 161, 165-66 (4th Cir. 1998) ("the language of §1988 does not mention Article III standing as an added requirement, distinct from the stated criterion of 'prevailing party'"). If this is so, the opinion plaintiffs now seek would not only be "advisory," it could be irrelevant to the very concerns which prompted the motion for reconsideration. But see Martinez v. Wilson, 32 F.3d 1415, 1422 (9th Cir. 1994) ("a claim a plaintiff has no standing to assert is unmeritorious. Accordingly, awarding fees to [such a plaintiff]...would not be consistent with the purpose of Section 1988").

should conserve scarce judicial resources, and avoid potentially improper judicial prognostication, by postponing any decision regarding an attorney fee award until after the Sixth Circuit issues its opinion in this case on appeal. Accordingly, the Court hereby Orders that: (1) it will not rule on any post-judgment motion regarding attorney's fees until after the Sixth Circuit issues an Order disposing of the appeal in this case; and (2) the parties may file such a motion on or before the date 30 days after the Court of Appeals issues its decision.

IT IS SO ORDERED.

/s/_____
KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

No. 01-1106

In the
SUPREME COURT OF THE UNITED STATES

CITY OF PARMA, OHIO,
Petitioner

v.

CLEVELAND BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, AND THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,
Respondents.

On Petition for Writ of Certiorari
To the United States Court of Appeals
for the Sixth Circuit.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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In the
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BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

OPINION BELOW AND JURISDICTION

The Opinion of the Sixth Circuit reversing the district court's grant of summary judgment in favor of Petitioner Parma is reported at 263 F.3d 513. Plaintiffs-Respondents agree with the Petition that it was timely filed, and that this Court has jurisdiction under 28 U.S.C. 1254(1) to grant or deny the Petition. Pet. 1. The decision of the district court granting summary judgment is not published.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III of the Constitution limits the jurisdiction of federal courts to "Cases or Controversies." Petition. The relevant provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et. seq. ("Title VII") are set forth in the Statutory Appendix.

STATEMENT

1. The Underlying Facts.

Parma is a City adjoining Cleveland with a population that was less than 1% black in 1970, and less than 1% black in 1990. Pet. App. at 6a. Effective December 6, 1976, Parma provided by Ordinance that "No person shall be appointed or employed by the City of Parma unless such person is a bona fide resident of Parma." Pet. App. 69a. The Ordinance also specified that "All persons appointed and/or employed after the effective date of this ordinance shall maintain their residence within the City of Parma." *Id.* That Ordinance was signed by Mayor John Petroska. *Id.*

In 1980, Parma was found by the United States District Court for the Northern District of Ohio to have engaged in housing practices that discriminated purposefully against blacks, based on the conduct and the ordinances of Parma under the leadership of Mayor Petroska. Pet. App.5a-6a; JA 939-950. United States v. City of Parma, 949 F. Supp. 1049 (N.D. OH 1980), aff'd as to liability. 661 F. 2d 562(6th Cir. 1981), *cert. denied* 456 U.S. 926. Mayor Petroska publicly opposed proposed public housing in Parma and equated public housing with housing for blacks and particularly for residents of the "East Side of Cleveland" who

are predominantly black; and the president of Parma's City Council stated publicly that "I do not want Negroes in the City of Parma." 949 F. Supp. at 1068-1073 and 1077-1081, quotes at 1079.

On April 7, 1981, Mayor Petroska promulgated and published an Affirmative Action Policy for Parma, stating its intent was to take such "measures as it deems appropriate to eradicate" every vestige of discrimination from its employment practices. J.A. 939, 942. While that Policy stated that it "does require vigorous action to locate and attract qualified minorities", the Policy provided that applications must be obtained from Parma City Hall, and that "Job openings will be posted on the bulletin board located in the main lobby" and in other public areas where all city ordinances are posted. J.A. 948. The only reference to recruiting was a statement that "All sources of recruitment will be provided copies of the City's Affirmative Action Program and will be encouraged to actively recruit with the Policy and Plan in mind." *Id.* No external sources of recruitment were identified.

In 1988, Parma hired its first black employee, a resident of Parma when she applied, and she was Parma's only black employee out of more than 460 full time employees, a work force which was less than one fourth of one per cent black. Pet. App.7a. In that year, Parma modified its residency requirement to make it a "move-in" requirement, whereby applicants from Cleveland and other neighboring communities could apply, if they agreed to move and establish "permanent" residence in Parma within 18 months. Pet. App. 70a. In 1995, Parma amended the Ordinance again to provide that an employee could live anywhere within a fifteen mile radius of Parma. In 1996,

Parma extended the radius to eighteen miles. Pet. App. 10a-11a.

In 1996, Parma employed only two (2) blacks (the resident clerical employee hired in 1988 and one police officer hired in 1992) out of 464 full time employees, and no blacks out of approximately 314 part time employees, for a total municipal work force of approximately one fourth of one percent black (0.26%). Pet App. 7a Of the 32 new employees hired in 1996, not one was black. Pet App. 7a.

In contrast, the work force of private employers in Parma in 1990 was 9.5% black; the private work force in the Cleveland Metropolitan Area was 15.5% black, and the municipal workforce available to Parma was approximately 19.6% black, because blacks have traditionally and still work disproportionately more in government than in private industry, indicating "'no meaningful probability that the event has occurred by chance.'" Pet App. 8a-9a. The chance that Parma would hire no black employees out of the 32 full time employees was between 2.9 and 7.5 standard deviations from the proportion expected by chance, so that there was "'very little probability that the failure to hire any blacks was due to chance." Pet App. 9a-10a.

Of the 28 white applicants who secured employment from Parma in early 1997, 25 of them were residents of Parma. J.A. 12a. Similarly, of the 13 full time positions posted for new hires, from November 20, 1995 through March 8, 1996, 6 were filled by former part-time City employees and 2 more were filled by transfer or promotion. *Id.*

Parma distributed and displayed posters and brochures directed at minorities at Cleveland State

University and at two community colleges, and listed scheduled civil service examinations not only in the *Cleveland Plain Dealer* and the *Sun* newspapers, but also in the *Communicator* and the *Call & Post,* newspapers targeted at Cleveland's black community. J.A. Pet 12a.

The NAACP is a voluntary association devoted to the elimination of discrimination and racial prejudice in this country, improving the social and economic status of minority groups and securing equal opportunities for blacks and other minorities. Persons who join and pay dues are considered members. It has branches throughout the United States and seeks to accomplish its goals by litigation as well as by other means. Pet. App. 67a.

2. The Proceedings in the District Court.

a. Proceedings Prior to Decision. After conducting an informal investigation and filing a charge with the Equal Employment Opportunity Commission ("EEOC") earlier in 1990 (Charge No. 220900841, J.A. 193), and receiving a right to sue letter, the NAACP filed this suit against Parma under Title VII on Aug. 6, 1990. J.A. Pet. App. 4a. The Complaint alleged that Parma engaged in a pattern or practice of discriminatory employment practices against blacks, including discrimination in recruitment and hiring, and specifically recruitment practices which advise residents, and friends and relatives of incumbent employees, of employment opportunities, without advising black persons in the relevant labor market of such opportunities, and by practices favoring residents and friends and relatives of incumbent employees over non-residents and others, and by use of selection procedures that have a discriminatory impact against blacks and are not shown to be job related. J.A. 4a and 13a-15a.

The case was assigned to Judge Frank J. Battisti that day, under the district court's related case procedures. Parma filed a motion to reassign the case to another judge, which was denied, and Parma filed a notice of appeal in September 1990, and asked the Sixth Circuit to consider the appeal as a Petition for a Writ of Mandamus. The appeal was dismissed on the NAACP's motion on February 13, 1991. JA 123 and 142-143.

On December 28, 1990, Parma filed its answer. J.A. 5, Docket #5. It raised no defense or other contention about the inadequacy of the EEOC charge or other lack of notice of the NAACP's allegations in contained in the complaint (para. 14(g)) challenging the lawfulness of its tests for police officer, firefighter and other civil service examinations on grounds of their adverse impact against blacks and lack of validity.

In 1991 the parties engaged in extensive written discovery, took numerous depositions, and filed motions to compel, for a protective order, for leave to amend, and for additional discovery time, and for additional time within which to file dispositive motions. Docket #s 17-67. Among the depositions taken by the NAACP were those of Parma's civil service officials and one of its expert witnesses about the adverse impact of those tests and the lack of validity evidence. Pet. App. 45a-47a. No objection was raised by Parma as to a possible lack of relevance of those questions based upon lack of notice in the EEOC charge. *Id.*

On September 25, 1991, the defendant moved to dismiss the action for lack of standing and lack of ripeness. Docket # 55. The NAACP filed a motion for partial summary judgment in November, 1991, and on December 12, 1991, the district court ordered that the plaintiffs submit "such

further particularized allegations of fact" within ten days, and the NAACP filed an amendment to their complaint on December 20, 1991. Docket #s. 81-82.

On December 30, 1991, Parma moved for summary judgment and filed its opposition to the NAACP's motion. Docket #83. On October 1, 1992, the district court held a status conference with the parties, and on October 3, 1992, the NAACP filed a motion for leave to file a 2d Amended Complaint, which Parma promptly opposed. Dockets #103-105.

The district court per Chief Judge Battisti held another status conference on June 16, 1994, and set a schedule for supplemental briefing . After Judge Battisti's death, the case was transferred to Senior Circuit Judge Robert Krupansky on November 1, 1994. Pet App. 5a, fn. 1.

On January 1, 1996, the case was reassigned from Judge Krupansky to Judge O'Malley, who denied the motion of Artis Tomblin to intervene on April 15, 1996 and on April 18, with the agreement of the parties, denied all pending motions, without prejudice, and on June 16, 1996 referred the case to mediation. J.A. 15. Parma moved twice for extensions of the time for mediation, and the time for mediation was extended to January 27, 1997. J.A. 15-17. The mediation efforts were unsuccessful. Following a status hearing before Judge O'Malley on January 29, 1997, the parties noticed and took further depositions in February and March, 1997.

Parma filed a motion for summary judgment on March 26, 1997, and the NAACP filed a cross-motion for partial summary judgment on April 28, 1997. Parma filed a motion to strike all references to the testimony of the

NAACP's expert witnesses Dr. Seberhagen and Herbert Hammerman in the NAACP's opposition to Parma's motion for summary judgment, and also moved to strike an affidavit of Ronda Crayton. J.A. 18-19. Briefing on those motions was complete by July 21, 1997. J.A. 19.

Parma argued on summary judgment that the suit was untimely because it was not filed within 300 days of the enactment of the 1988 amendment to its ordinance. But Parma did not raise any argument on summary judgment that it did not have notice in that charge of plaintiffs' allegation in para. 14(g) of the Amended Complaint that Parma's use of unvalidated examinations had a discriminatory impact in violation of Title VII. See Supplement to Supp. App. 1-25. On one page of its Memorandum in Support, Parma argued that the case was moot because "Parma's hiring and recruitment program is in compliance with the law." Supp. to Supplemental Joint Appendix at 25. It cited no documents or cases in support of that contention.

b. The District Court's Decision Granting Parma Summary Judgment. On March 28, 1998, the district court (per Judge O'Malley) entered a Memorandum Opinion and Order holding that the claims of unlawful tests had not been properly raised in the EEOC charge, and that the claims of the NAACP were moot and that the NAACP lacked standing; and it granted Parma's motion for summary judgment and denied the NAACP's motion.. Pet. App.62a-126a.

1) The district court ruled that first the only issues before it were allegations of preference for residents of Parma and the friends and relatives recruitment system, because the EEOC charge did not mention use of written "tests" and the complaint only alleged use of "unvalidated

selection procedures that have the effect of disproportionately excluding from employment those few blacks who" receive notice of employment opportunities (Pet. App. 81a-86a). The district court raised this issue *sua sponte*, for Parma had not raised any objection that the use of unvalidated tests was not at issue under the complaint in its Answer or by objections during the NAACP's depositions of its civil service officials and testing expert.

2) On the issue of standing, although it recognized that this kind of suit was consistent with the purposes of the NAACP (Pet App. 67a), the district court held that a "'plaintiff must maintain standing throughout all stages of his litigation'" and that "'standing is evaluated at the time it is challenged.'" Pet App. 112a. In doing so, it quoted from and relied upon *City Communications, Inc. v. City of Detroit*, 888 F.2d 1081, 1086 (6th Cir. 1989), which was not a case arising under Title VII, and attempted to distinguish *Senter v. General Motors Corp.*, 532 F. 2d 511, 520 (6th Cir. 1976) on the grounds that it was a class action suit brought under Title VII. Pet App. 112a.-113a. It ruled that each of the members identified by the NAACP as having been harmed by Parma's practices had failed to maintain both membership in the NAACP and efforts to apply for positions with Parma, so that the NAACP lost standing to prosecute the claims of discriminatory employment practices. Pet. App. 103a-118a.

3) On the issue of mootness, the district court ruled that this suit was like suits that challenge an ordinance or other legislative enactment, and that because Parma had in 1995 repealed the portion of its residency ordinance requiring that out of town applicants become residents of Parma, "Parma has given the NAACP what it sought", and there is no reason to expect that Parma will re-enact that provision of law. Pet App. 87a-91a. In addition, the district

court ruled that Parma had "irrevocably eradicated" the effects of its prior residency requirements because it stopped hiring from residents-only lists; and because it advertised in newspapers of general circulation and in *The Call & Post* newspaper and engaged in other recruiting efforts. Pet App. 91a-92a.

In its Judgment Entry of March 30, 1998, the district court granted Parma's motion for summary judgment and denied the motion of the NAACP for partial summary judgment. Pet. App. 62a-63a.

The NAACP filed a timely motion to reconsider or alter the Memorandum and Order of March 30, 1998, but that motion was denied on March 22, 1999. JA 84-88. The NAACP's notice of appeal was filed on April 20, 1999.

3. The Decision of the Court of Appeals.

The United States Court of Appeals for the Sixth Circuit reversed the grant of summary judgment and remanded the case for further proceedings consistent with its decision. Pet. App. 3a-49a. That Court ruled that standing is to be determined as of the date suit is filed, and not at the time standing is challenged. Pet. App. 21-25. It then determined that the NAACP submitted evidence showing that Artis Tomblin, a member of the NAACP, had been injured by Parma by the time the complaint was filed, and evidence that Parma had failed to notify Tomblin of civil service examinations as was its stated practice, and that he suffered continuing effects from that conduct of the kind warranting injunctive relief. Pet. App. 26a-35a. It also noted that Parma did not dispute that the interests at stake in this case are germane to the NAACP's purpose, or that the NAACP's claims for prospective relief do not require the

participation of individual members. Pet. App. 35a, n. 19. On this issue, the decision of the Court of Appeals was unanimous. The decision expressly refrained from deciding the possible standing of Collins, Childress, Blanton and McIntosh, who were not members of the NAACP at the time the complaint was filed. Pet. App. 35a, n. 19.

On the issue of mootness, the Court of Appeals ruled that Parma had failed to prove that its allegedly discriminatory recruiting, selection and hiring practices could not be expected to recur, and "Parma failed to show that its alleged discriminatory practices had ceased..." Pet App. 36a-39a. The Court also ruled that the plaintiffs had submitted evidence showing that Parma's recruitment efforts "arguably resulted in no change in the racial composition of Parma's municipal workforce." Pet. App. 40a-43a. It was on the issue of mootness that Judge Boggs dissented. Pet. App. 49a-50a. See below, p.7.

On the question of breadth of the EEOC charge, the Court of Appeals also ruled that the district court erred "by limiting the scope of this action to a challenge to Parma's former residency requirement and alleged practice of limiting the recruitment of municipal employees to word-of-mouth through friends and relatives of Parma's municipal employees by excluding any challenges to the testing procedures used by Parma, because of the charge's express reference to hiring practices concerning "*civil service jobs*" and to the verb "*select*" in its allegation of how Parma discriminated. Pet. App. 43a-45a. The Court of Appeals ruled that the NAACP's EEOC charge had placed Parma on notice of its claim that Parma was using unlawful civil service examinations for police officers and firefighters and other civil service personnel and that the NAACP depositions of its civil service officials and its police testing

expert had also placed Parma on notice and Parma raised no objections based upon lack of notice in the district court. Pet. App. 43a-48a. The Court of Appeals also rejected Parma's contention that the Complaint was untimely because it was not filed within 300 days of the date of the 1988 amendment to its residency ordinance, because the NAACP alleged that a variety of Parma's discriminatory recruitment, selection and hiring practices are continuing. Pet. App. 48a-49a.

Circuit Judge Boggs agreed with the panel's decision that the NAACP had standing to sue when it brought suit, and that the claims have not become moot solely because of the actions taken by Parma, but he dissented from the Court's decision on the ground that the claims of the NAACP have become moot because Tomblin had lost personal interest in the case by allowing his membership in the NAACP to lapse and that he no longer had a personal stake in securing employment with Parma, and therefore no personal stake in the outcome of the case. Pet. App. 49a-61a.

Parma filed a petition for rehearing with a suggestion for rehearing en banc, and argued that the panel in this case improperly overruled the Sixth Circuit's decision in *City Communications v. City of Detroit, supra.* No judge in active service requested a vote on the suggestion for rehearing en banc, and the petition was referred to the original panel, and was denied. Pet. App. 2a. Judge Boggs would have granted rehearing for the reasons stated in his dissent. *Id.*

REASONS FOR DENYING THE PETITION

There is no conflict between the decision below and the decision of another Court of Appeals, and there is no conflict between the decision below and a decision of the highest court of a State. Nor did the Sixth Circuit decide any

important issue of federal law that should be, but has not been, resolved by this Court. Rule 10 of the Rules of this Court.

Although the Sixth Circuit reversed the district court on the issue of standing as well as mootness, Parma seeks review only on the mootness rulings under Article III.[1] On other issues, the Court of Appeals ruled Parma had failed to show that the discriminatory practices alleged in the complaint had even ceased, much less that the effects of Parma's discriminatory practices had been eradicated. Pet. App.41a-42a. In its rulings on mootness, the Sixth Circuit applied the decisions of this Court to the facts of record in this case on the motion for summary judgment. *County of Los Angeles v. Davis,* 440 U.S. 625, 631 (1979), and cases cited, and *Northeastern Fla. Chapter of the Associated Gen. Contractors Ass'n* , 508 U.S. 656, 662 (1993).

Although Parma repeatedly states that the decision below is in conflict with the decisions of this Court, it fails to show that any conflict between the Circuits in decisions subsequent to *Friends of the Earth v. Laidlaw, supra,* and it fails to show any conflict between the decision below and the decision in that case. Once a plaintiff has established "Article III standing at the outset of the litigation," this Court ruled

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[1] Under Title VII, any person who claims to be aggrieved may bring a charge, and may bring suit once a right to sue letter has been issued. See,42 U.S.C. 2000e-5(b) and (f)(1), SA 2-3 below. Where such language is used, the Courts, including the Sixth Circuit and this Court, have ruled that Congress "intended to define standing as broadly as is permitted by Article III, *Hackett v. McGuire Bros. Inc,* 445 F.2d 442, 446 (3d Cir. 1971); *Trafficante v. Metropolitan Life Ins. Co.,* 409 U.S. 205, 209 (1972) (quoting and relying upon *Hackett* in interpreting the Fair Housing Act); and *Senter v. General Motors Corp. supra,* 532 F.2d at 517.

that "the defendant claiming that its compliance moots a case bears the formidable burden of showing that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., supra,* 528 U.S. at 180 and 189-190 (quote from 190). The Sixth Circuit's holding on mootness is fully consistent with this most recent decision of this Court on mootness. Parma does not assert any inconsistency between the decision below and *County of Los Angeles v. Davis, supra.* Pet App. 36a-40a. Rather it mentions that case only in passing. Pet. 9. There is no inconsistency between the decision below and the holding of this Court in *Friends of the Earth, supra,* or in *County of Los Angeles v. Davis,* 440 U.S. 625, 631 (1979). While the Petition argues that the Court of Appeals below improperly applied that decision (Pet. at 9), it does not show how or why it is in conflict with *County of Los Angeles v. Davis, supra.*

Parma urges the Court "to reconcile the ongoing debate among the circuits to clarify when standing must be measured, and to explain the relationship between standing and mootness." Pet. at 23. This Court does not to resolve debates by granting review of their language, but to resolve conflicts among the circuits in their interpretations of federal law, and other important issues of federal law that have not been settled by this Court. Rule 10, Rules of this Court. Moreover, this Court in *Friends of the* Earth v. *Laidlaw Environmental, supra,* resolved the conflict between circuits on the confusion between standing and mootness arising in part because of the conflation of the two terms. 520 U.S. at 171. To the extent that the language in earlier decided decisions of other circuits, and particularly in *Powder River Basin Res. Council v. Babbitt,* 54 F.3d 1477, 1485 (10th Cir. 1995) is in conflict with the ruling in *Friends of the* Earth v.

Laidlaw Environmental, supra, that language is no longer viable.

No Court of Appeals has interpreted the decision in *Friends of the Earth v. Laidlaw Environmental, supra,* differently than did the Sixth Circuit below. The two appellate decisions that have applied this Court's ruling in *Friends of the Earth, supra,* have recognized, that while standing and mootness are related, the burden of proof is on the plaintiff to show standing at the outset of the suit, and that there is a heavy burden on the defendant seeking to dismiss for mootness to show that the subsequent events have eradicated the need for relief. *Becker v. Federal Elections Commission,* 230 F. 3d 381, 386, n.3(1st Cir. 2000); *White v. Lee,* 227 F.3d 1214, 1243 (9th Cir. 2000). The only decision subsequent to *Friends of the Earth, supra,* relied upon by the Petition is that in *Landmark Land Co. v. United States,* 256 F.3d 1365, 1380 (Fed. Cir. 2001). Pet. 22. That decision does not discuss or cite the decision in *Friends of the Earth v. Laidlaw, supra.* See, 256 F.3d at 1380. Moreover, that case involved the authority and standing of a federal agency, the FDIC, to obtain a judgment against the United States, not a question of mootness in a case between private parties.

Parma argues that the Court of Appeals erred by failing to take into account conduct by a party other than Parma as a possible ground for considering the case moot, and suggests that the Court of Appeals stated that it considered "only" Parma's conduct. Pet. 6-9. However, the Court of Appeals used the word "only" to modify "subsequent events", and did not limit the actor in those events. Pet. App. 36a. Indeed, approximately a year after the decision in *Friends of the Earth v. Laidlaw, supra,* this Court unanimously held moot a case in which a corporation that

brought suit to challenge the denial of a City license subsequently filed for review by this Court, but had chosen to withdraw its application for renewal of its license and given notice of its intent to close its business before this Court could act upon it. *City News & Novelty, Inc. v. City of Waukesha,* 531 U.S. 278 (2001). In that case this Court noted (531 U.S. 284, n. 1) "the general rule that voluntary cessation of a challenged practice rarely moots a federal case", citing *Friends of the Earth v. Laidlaw, supra,* and earlier decided cases.

In this case, Parma sought to have the case dismissed solely because of its contention that its employment practice was lawful. It sought dismissal for mootness only because "Parma's hiring and recruiting program is in compliance with the law." Supp. to Supplemental Appendix, p. 25 of Parma's memorandum in support of its motion for summary judgment. The Court of Appeals below decided the only mootness issue that Parma raise in the district court, namely that Parma's conduct rendered the case most and ruled to the contrary. The Court of Appeals committed no error in holding that fact to be one on which there was a material and genuine dispute, particularly in light of Parma's failure to hire any blacks since 1992. Pet. App. 36a-43a. The decision below that once a plaintiff association has shown standing based on the interest of one or more members it is not the association's burden to show that their interest continued. Rather it is the defendant's burden to show change in circumstance warranting mootness. That decision below is not a departure from the decision in *Friends of the Earth v. Laidlaw, supra,* or any other decision of this Court.

This Court has recognized that suits by associations are often "advantageous both to the individuals represented and to the judicial system as a whole" and may be superior

class actions in those respects. *United Automobile Workers v. Brock*, 477 U.S. 274, 289-90 (1986). Where an "association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured." *Warth v. Seldin*, 522 U.S. 490, 515 (1975). However, this Court did not identify the Article III requirements for standing until its decision in *United Food and Commercial Workers Union Local 751 v. Brown Group,Inc.*, 517 U.S. 544 (1996). In that case it ruled that where an association has shown that it has at least one member who has been harmed by a practice, and that the relief it seeks is germane to it purposes, there is no Article III requirement that the individuals affected participate in the suit because the association may be an appropriate representative of its members. *United Food and Commercial Workers v. Brown, supra.* 517 U. S at 551-557.

The Questions Presented in the Petition draw a distinction as to Article III standing between situations in which plaintiffs seek an injunction and one in which the claim is for monetary relief. But Congress sought to give associations as well as other plaintiffs the broadest standing possible under Article III, both under Title VII (see footnote 1 above, p. 7) and in the Clean Water Act. See *Friends of the Earth* v. *Laidlaw Environmental, supra,* 528 U.S. at 174, 189-194. Nor is there any requirement that the members of an organization receive a financial benefit from the litigation, because the members of the Friends of the Earth received nothing tangible from the defendant in that case, for the penalties recovered for ongoing violations of the Clean Water Act went to the Treasury of the United States. 528 U.S. at 185-186. Those penalties were relevant only because they tended to abate the allegedly unlawful conduct. Similarly in this case, the members of the plaintiffs, if they

succeed in obtaining injunctive relief, will have deterred and abated the discriminatory practices of Parma that were ongoing when this suit was filed, and which still may be continuing.

The Petition fails to articulate why Article III requires a continuing personal stake in the litigation by the member(s) identified as having been injured, when there are likely to be other members whose injury was of the same kind, just as the Court may change a class representative and replace him or her with another, once a case has been properly started. Judge Boggs' dissent also does not suggest why constitutional standing under Article III by an organization should depend upon continuity in membership of one person, particularly where the plaintiffs have offered evidence of other members who also believed that they suffered as a result of the discriminatory practices of Parma. In this case, the NAACP did in fact offer evidence of other members who had joined the NAACP after suit was filed. See, Pet. App. 35a, n.19.

Once an organization has established standing by showing that it had one or more members who were injured in fact, and that the interests that the organization seeks to protect are germane to the organization's purpose, the "association's litigators will be in a position to serve as the defendant's natural adversary" thus assuring that Article III standing is satisfied. *United Food and Commercial Workers Union Local 751 v. Brown Group,Inc.*, 517 U.S. 544, 555-556 (1996).

CONCLUSION

For the reasons set forth above, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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No. 01-1106

In the
Supreme Court of the United States

CITY OF PARMA, OHIO,
Petitioner,

v.

CLEVELAND BRANCH, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, and NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF

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United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.,
517 U.S. 544 (1996) 6

Parma's Petition for Certiorari explains how and why the Sixth Circuit's opinion conflicted with this Court's prior rulings on both mootness and an organization's ability to litigate on its members' behalf. Parma further argued that the *NAACP* opinion provides this Court with an opportunity to offer some much-needed guidance to the lower courts over the differences between standing and mootness and to clarify a debate among the circuits about when standing should be measured.

The NAACP raises three arguments in response: (1) Parma has waived its mootness argument because it discussed only voluntary cessation in the courts below; (2) the Sixth Circuit's opinion did not conflict with this Court's binding precedent; and (3) once an association has shown it has standing, neither its own actions nor the actions of its members can moot the case. These arguments are not only without merit, they echo the problems and issues raised by the Sixth Circuit's opinion. That is, both the NAACP and the Sixth Circuit conflate standing and mootness and thereby reveal the fact that this Court must accept certiorari. Without intervention, plaintiffs in this circuit who have standing when the case is filed have met the case-or-controversy requirement for the duration of the litigation. This is not the law.

A. Parma Has Consistently Argued that Because of the Plaintiff's Actions There is No Longer a Live Case or Controversy

In its Brief in Opposition, the NAACP suggests that neither of the lower courts addressed the issue of whether a plaintiff's actions can moot a case. According to the NAACP, that is, Parma "sought dismissal for mootness [in the district court] only because 'Parma's hiring and recruiting program is in compliance with the law.' " The NAACP

further states that the "Court of Appeals below decided the only mootness issue that Parma raise [sic] in the district court, namely that Parma's conduct rendered the case most [sic] and ruled to the contrary." (Br. in Opp'n at 16). Both statements are, quite simply, incorrect.

Throughout this litigation, Parma has argued that the case is moot in part because the NAACP has failed to identify any members with an ongoing interest in the litigation.[1] Under the heading "The NAACP's Claims Are Moot," Parma argued in its Motion for Summary Judgment that Art Tomblin was not a member of the NAACP and that he had "confirmed . . . there was nothing else Parma could do regarding the inquiries about employment." (Mtn. for S.J. at 41). Under the heading, "None of the Named Individuals Retain an Interest in the Litigation," Parma argued in its Brief to the Sixth Circuit that "not a single individual named by the NAACP maintains more than a mere abstract interest in pursuing a position with Parma. This is not sufficient to constitute a continuing case or controversy, making the NAACP's claims moot." Final Br. at 42-43). In that same brief, Parma also pointed out that Tomblin had failed to maintain his membership in the NAACP and that his failure to do so negated the court's authority to hear the case. (Final Br. at 23). In its Petition for Rehearing, Parma reiterated that

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[1] In making these arguments, Parma at times used the language of standing to apply a mootness analysis. In other words, it argued that the NAACP had "lost standing" – *i.e.*, the case had become moot – because it could no longer show the existence of a live case or controversy. (*See* Pet'n at 21-24 for a full discussion of the conflict among the lower courts about when standing should be measured *and compare*, *e.g.*, *Becker v. FEC*, 230 F.3d 381, 386 n.3 (9th Cir. 2000) *with Landmark Land Co., Inc. v. FDIC*, 256 F.3d 1365, 1380 (Fed. Cir. 2001)).

"[c]ases can become moot – as Parma contends in this case – by the acts of a plaintiff as well as the acts of a defendant." (Pet'n for Rehearing at 9). Citing to *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001), it further argued that "the acts of Tomblin have sapped this controversy of vitality. Tomblin's lack of a present, concrete interest makes it such that he can gain nothing from the continuing of the litigation." (Pet'n for Rehearing at 9).

The Sixth Circuit's failure to consider whether Tomblin's actions had rendered the case moot thus did not rest on Parma's alleged failure to raise the issue. To the contrary, the Sixth Circuit chose to disregard not only Parma's arguments, but also those raised by the trial court in its Memorandum of Opinion and Order. There, the district court discussed at length the fact that Tomblin (and others) had failed to "maintain[ ] membership in the NAACP throughout this litigation, or even a significant portion of it." (App. at 111a; App. at 111a-117a (setting forth a full discussion of the issue)). The district court further stated that a shared desire to eliminate "racial discrimination *in general* . . . does not give [the NAACP] license to litigate claims on the basis of particular wrongs suffered by individual black persons, unless there is 'something more' connecting that individual person with the NAACP than shared interests and a fleeting membership in the organization." (App. at 114a).

The NAACP's arguments notwithstanding, this case is properly before this Court on all issues raised in Parma's Petition.

B. The Sixth Circuit's Opinion Conflicts With This Court's Prior Rulings

In its second argument, the NAACP contends that the Sixth Circuit's opinion is in accord with this Court's prior rulings. To support this contention, the NAACP cites to several lower-court opinions for the undisputed proposition that a defendant may seek to dismiss a case on the grounds of either voluntary cessation or a change in subsequent events. (Br. in Opp'n at 15). It then cites to *City News* for the same proposition, pointing out that "this Court noted [there] 'the general rule that voluntary cessation of a challenged practice rarely moots a federal case.'" (Br. in Opp'n at 16 (internal citation omitted)). And it suggested that the Sixth Circuit knew a plaintiff could moot a case because the court "used the word 'only' to modify 'subsequent events' and did not limit the actor in those events." (Br. in Opp'n at 15).

In making this argument, however, the NAACP merely highlights the problems in the Sixth Circuit's opinion. Like the Sixth Circuit, the NAACP points out that a case can become moot if a defendant voluntarily ceases to engage in the allegedly wrongful action.[2] Like the Sixth Circuit, the NAACP concedes that the actions of a party other than the defendant can moot a case. And like the Sixth Circuit, the NAACP ignores the fact that the plaintiff can be that other party – *i.e.*, that a plaintiff can render a case moot if he or she loses a cognizable interest in the outcome of the litigation. In other words, even as the NAACP and the Sixth Circuit

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[2] For instance, the district court held this case was moot because Parma had eliminated the residency requirement at issue, had engaged in "affirmative – and active – efforts to recruit individuals, including minorities," and had thus "given the NAACP what they sought to achieve by this action." (App. at 89a).

acknowledge that a plaintiff's actions can moot a case, they concentrate solely on Parma. Even as they point out that a wide variety of subsequent events can moot a case, they ignore the fact that Tomblin is no longer a member of the NAACP, that he "no longer alleges an injury that can be redressed by a favorable judicial decision," and that no identifiable member of the NAACP will benefit from an injunction. (App. at 60a (dissent)). To say so much as lip service is given to the actions of the NAACP and its one-time "members" would be an overstatement.

Both Parma and the Sixth Circuit thus conducted a mootness analysis that is in direct conflict with this Court's prior rulings. For instance, this Court stated clearly in *City News* that a case becomes moot when the plaintiff "sap[s] the controversy of vitality" and thereby loses "a legally cognizable interest in [its] outcome." 121 S. Ct. at 747 & n.1. The *Arizonans for Official English* Court stated with equal clarity that a case will become moot if the plaintiff "lack[s] a still vital claim for relief." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997). In short, nothing in the Constitution or this Court's prior opinions "justif[ies] a departure from the fundamental requirement that a plaintiff must have a continuing interest in the ongoing litigation in order for this court to exercise the limited jurisdiction it is granted by the Constitution." (App. at 60a, *citing Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70 (1983)). To rule otherwise – as did the Sixth Circuit in this case – is to contravene the case-and-controversy requirement set forth in Article III of the Constitution. *See Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (stating that the "case-or-controversy requirement subsists through all stages of federal judicial proceedings).

C. An Association With Standing to Litigate On Behalf of Its Members is Not Immune from a Mootness Analysis.

The NAACP's final – and apparently alternative – argument rests on *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544 (1996). According to the NAACP, that case stands for the proposition that "[o]nce an association has established standing by showing that it had one or more members who were injured in fact, and that the interests . . . the organization seeks to protect are germane to the organization's purpose, the 'association's litigators will be in a position to serve as the defendant's natural adversary.'" (Br. in Opp'n at 18 (quoting *id.* at 555-56)). As such, it concludes, Article III does not "require[ ] a continuing personal stake in the litigation by the member(s) identified as having been injured."[3] (Br. in Opp'n at 18).

In fact, the NAACP misstates the holding in *Brown Group*. That case holds only that the third prong of the *Hunt* test for associational standing is prudential rather than constitutional and may thus be abrogated. *Id.* at 556, 558. If Congress so chooses, in other words, an association may obtain *standing* to litigate on behalf of its members even if it seeks not injunctive relief, but damages. This Court did not suggest that either the constitutional or the prudential requirements for standing could somehow be equated with the

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[3] The NAACP's reliance on this language (that "Article III does not require a continuing personal stake in the litigation"), from this case, from this Court, after arguing that the Sixth Circuit's opinion does not conflict with this Court's prior rulings illustrates the confusion that exists. (*See, e.g.*, *City News*, 121 S. Ct. at 747 & n.1; *Spencer*, 523 U.S. at 7; *Arizonans*, 520 U.S. at 67.)

constitutional requirements for mootness. The Court did not hold that once an association has achieved standing neither its own actions nor the actions of its members could moot a case. And this Court did not hold that an organization could continue to litigate on behalf of its members even if none of those members had an ongoing interest in the litigation. To the contrary, it did not discuss mootness at all.

The NAACP appears to rely not on the actual holding in *Brown Group*, but on a series of faulty assumptions. For instance, it assumes that if a plaintiff has managed to meet all of the requirements for standing, that plaintiff's "task in avoiding mootness is over." (App. at 52a (dissent)). It assumes that because one element of associational standing is prudential, then the case-or-controversy requirement must be prudential for associations as well. And it assumes that because an organization at one time represented the interests of its members, it must necessarily do so now. As Parma discussed above and at length in its Petition, such assumptions are in direct conflict with this Court's prior rulings. *See, e.g.*, *City News* 121 S. Ct. at 747 & n.1; *Spencer*, 523 U.S. at 7; *Arizonans*, 520 U.S. at 67.

Unfortunately, however, such assumptions are not in conflict with the Sixth Circuit's ruling in this case as it presently stands. To the contrary, this case only reinforced such flawed assumptions by "conflate[ing] standing and mootness," (App. at 50a), by concentrating solely on Parma's actions, and by failing to determine whether a live case-or-controversy remains before the court. In doing so, the Sixth Circuit has suddenly allowed associations to litigate "on behalf of" individuals with no interest in the litigation and with so little interest in the association that they have dropped their membership. At the same time, this case has improperly broadened the limited jurisdiction granted to the federal courts

by the United States Constitution and invited both forum-shopping and a flood of essentially victimless lawsuits seeking relief benefiting no known, named individual. For these reasons alone, this Court's review is both warranted and necessary.

D. Conclusion

For the reasons set forth above and in its Petition for Certiorari, the City of Parma, Ohio respectfully requests that its Petition be granted.

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